UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

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In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.,

f/k/a General Motors Corp., et al.

Debtors.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, NY 10004-1408

February, 18, 2015

9:00 AM

B E F O R E :

HON ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

ECRO: K. HARRIS

Hearing re: Oral argument on Motion to Enforce

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

CLERK: All rise.

THE COURT: Good morning. Have seats everybody. Okay, am I correct that we're up to your reply, Mr. Steinberg?

MR. STEINBERG: Yes, your Honor.

THE COURT: Come on up please.

MR. STEINBERG: Good morning. Arthur Steinberg from King & Spalding with my colleagues from yesterday.

Your Honor, yesterday when I was listening to the plaintiff's arguments it seemed that they were trying to make this case into something that it's not. This matter is not about whether Old GM personnel could have done a better investigation of the ignition switch issue or other parts that have been recalled.

The issue of what Old GM knew is relevant in this hearing for a singular purpose, that being did Old GM have the requisite knowledge such that economic loss plaintiffs' unasserted tort claims were reasonably ascertainable. If it did, arguably the economic loss plaintiffs were entitled to direct mail notice. If not, publication notice was sufficient.

Your Honor asked yesterday what was the standard for reasonably ascertainable and context in this case is very important. Citing to you cases that talk about

contractual claims or where litigation has started is interesting, but the real cases are how did the courts approach the situation when you had an unasserted tort claim. And there when you're in that circumstance here the Court looks at the distinction between what is reasonably ascertainable and what is reasonably foreseeable and reasonably foreseeable does not make a creditor a known creditor.

And what plaintiffs in the GUC Trust argued yesterday was the reasonably foreseeable standard. And the case that best highlights what the difference was between reasonably ascertainable and reasonably foreseeable in the unasserted tort claim area is the Third Circuit decision in Chemetron 72 2F3d 341 and Chemetron was a claims bar date case and you know from yesterday my opinion that the claims bar date cases are different than the sale cases. The sale cases are easier the bar date cases arguable sometimes require greater notice.

But in the Chemetron case, the Third Circuit said that reasonable diligence in identifying claims does not require impracticable or extended searches in the name of due process. A debtor does not have a duty to search out every possible creditor and urge that entity to make a claim against it. So what you heard yesterday were people saying the notice should have said there is a safety defect so you

should consider what the ramifications are and here the Third Circuit is saying that even in the bar date context, the notice that goes out doesn't have to urge people to file a claim.

THE COURT: Pause please if you would Mr. Steinberg because Chemetron wasn't one of the cases that I read in advance. Was Chemetron, I mean I heard the language you read, was that a failure to notify in the claims context or a failure to notify in the 363 context?

MR. STEINBERG: Claims context.

THE COURT: And you pointed out before that a higher standard might at least arguably be imposed in claims when you have more time to do it than you would in a 363?

MR. STEINBERG: That's correct, your Honor.

THE COURT: Okay.

MR. STEINBERG: And then it goes on what is required is not a vast open-ended investigation. If a creditor could have been discovered upon investigation, but does not in the ordinary course of business come to the attention of the debtor, the creditor is not a known creditor which is I think the refutation to Mr. Weisfelner's argument about it should have shown up in the TREAD sheets and it should have then translated to the books and records of the company.

Then the Chemetron case focuses where the

requisite search should come. It said the requisite search comes from the debtor's own books and records. Efforts beyond a careful examination of those documents are generally not required. And then the Court goes on in talking about the dangers of using the reasonable foreseeable test. When a reasonably foreseeable standard is used, you create an impossible burden on the debtors. Such a requirement would completely vitiate the important goal of a prompt and effectual administration and settlement of the debtor's estates. Courts should not force debtors to anticipate speculative suits based on lengthy chains of causation.

And that is, I think, the answer to your question about the danger of doing what the plaintiffs and the GUC Trust has urged you to do as the type of notice that should be done in the 363 sale notice context. The fact of the matter is they have never been able to show you anything that approaches the type of notice that they're urging that your Honor should have given and approved in this case. There is no precedent like this. They're asking you to break new ground.

Judge Lifland in the Spiegel case talked about the same type of concepts. He said that the debtors not required to employ a crystal ball when one complaint is filed to determine whether any other similar claims exist.

Everyone who may conceivably have a claim is not entitled to actual notice. Efforts beyond a careful examination of the debtor's books and records are generally not required.

THE COURT: All right. Let me interrupt you with this similar question. Is that in the 363 context or the claims context?

MR. STEINBERG: That was a plan injunction context.

THE COURT: Plan injunction which expunges claims. Plans typically don't come early in the case, they come after a while. All right, keep going.

MR. STEINBERG: Another example which is an In Re: Agway, which is a bar date case. It was a Judge Gerling case in the Northern District of New York. It was interesting in that it cited three Bankruptcy Court decisions from the Southern District of New York -- Brooks Fashion, L.F. Rothschild and Best Products -- all for the same proposition, that a debtor is not charged with the knowledge or existence of a contingent claim absent a claimant's express statement of its intent to lodge a claim against the debtor.

And then, your Honor, in our briefing we cited was we thought was an important case which I did not discuss yesterday, but is on the same point, which is the New Century case from the Bankruptcy Court in Delaware and that

was also a bar date case.

There a late file claimant asserted that she was a known creditor and should have received direct mail notice of the bar date because at the time of the bar date the debtor had done internal investigations of the lending practices that she was complaining about. There was a pending examiner investigation at the time relating to those lending practices and there were many, many lawsuits based on such lending practices.

The court held that that claimant was an unknown creditor and hat publication notice was proper. The existence of litigation in one person does not make every customer in the same category a known creditor.

We cited in our papers also the Enron decision, also a bar date case. There a formal FERC investigation commenced prior to the bar date and that did not transform a contingent creditor, there the State of Montana, who ultimately was determined to be a victim of Enron's market manipulation, into being a known creditor.

And we also talked about the Burton case and the Burton case we think is important on a number of different grounds including this ground because in Burton, the Court had to face the due process issue. The decision talks about successor liability/due process and there the claimant was arguing that they were future creditors, sort of like the

same argument that the GUC Trust made and Judge Bernstein rejected that argument. And said if you weren't a future creditor then you were an unknown creditor.

Many Burton plaintiffs were not subject to the recall so the issue of whether there was a recall and that distinguished Burton from our case is not relevant. Burton there were two different vehicles at stake. One of them had the recall, the others didn't. When Judge Bernstein ruled in this matter he ruled across the board for the recalled and unrecalled people and said that publication notice in this case was sufficient.

Burton was also relevant because the judge was not prepared to just accept what the parties did and he wanted to enforce and protect the order that had been entered in Chrysler. So when the economic loss plaintiffs asserted a failure to disclose claim, he said that doesn't apply to you as a matter of law because it only applies to accident victims, not you, and I'm not letting you insert that claim as a backdoor successor liability claim and he had that claim stricken.

He also distinguished the Grumman case. He said that Grumman is not applicable to an economic loss claim situation here. And he also said that my ruling is applicable not only to the original purchasers of the cars before the sale, but also applicable to the people who

bought the cars on the used sale market after the sale. He didn't draw the distinction that the plaintiffs have tried to do in the pre-sale and the post-sale consolidate complaint. He said across the board if you're involving an old Chrysler vehicle you are barred.

Now against this backdrop you have three dispositive facts that are not really controverted in this case which I think address this issue. One is that the named plaintiffs in the pre-sale consolidated complaint did not file any court pleadings or otherwise commence litigation against Old GM with respect to the ignition switch in their vehicle so that the claimants didn't come forward and assert a claim. The second --

THE COURT: Time out. Are you talking about in Chrysler or here?

MR. STEINBERG: Here. Here. I've now switched to the uncontroverted facts in this case that the named plaintiffs in the economic loss complaints have never asserted a litigation claim or asserted a claim against Old GM at the time of the sale relating to the ignition switch in their vehicle.

THE COURT: Okay. So, your point is they weren't done with litigation docket. Of course, Mr. Weisfelner is going to say in eight seconds in surrebuttal that's because they didn't know they had a claim.

MR. STEINBERG: Well, that's true. That's true. They could say that, but then they get to the second factor.

THE COURT: Okay, keep going.

MR. STEINBERG: The second factor is that, and you heard it yesterday, that some of these people had this car for five years before the sale was actually approved and they never asserted a claim. So, it wasn't like they didn't know that they had a claim for the month before the sale. This was a situation where they were actually driving their cars for five years and they didn't assert a claim and that's relevant for the reasonably ascertainable, reasonably foreseeable standard. So the length of time that someone doesn't assert a claim becomes a relevant factor for seeing whether something is reasonably ascertainable or not.

And then the third thing is that the Old GM books and records did not show any of these liabilities to the named plaintiffs. So those three factors you have right here. A known creditor status for section 363 notice purposes cannot depend on events that took place years before the sale when there was no pending litigation as of the sale.

Known creditor status for a Section 363 sale notice purposes cannot be determined by piecing together separate items of information oftentimes related to different events acquired over many years by different

personnel and then concluding that something should have been included in the books and records even though it wasn't there. That is the reasonably foreseeable standard. That is not what the cases say is the reasonably ascertainable standards.

Borrowing the imputation cases, those concepts that are used to show corporate liability is just not germane to determining whether a claim was reasonably ascertainable for Section 363 notice purposes. In a mega bankruptcy case like Old GM was, with hundreds of thousands of employees working for a debtor, that could never be the standard for a Section 363 sale notice purposes. To impose something like that would be unprecedented, would wreak havoc for Section 363 sales which is a fundamental part of today's Chapter 11 process.

I'd like to now turn to a discussion on some of the cases that were highlighted by my opponents. In our briefing we distinguish them and we discuss them, but I think that there are five or six cases that require some further noting because I think they were used for a purpose that doesn't necessarily support their proposition.

The first was the DPWN case, which the GUC Trust talked about in their presentation and this --

THE COURT: Are you talking about the circuit one of the Gleeson one?

MR. STEINBERG: Well, I was going to talk about the fact that Ms. Rubin was referring to the Gleeson one which was the District Court opinion which was reversed by the Second Circuit.

THE COURT: Right, so we have to slice and dice John Gleeson's decision to see what parts remain after the reversal and what don't.

MR. STEINBERG: That's right.

THE COURT: Okay.

MR. STEINBERG: And I just wanted to point out that that discussion where you were referring to Judge Gleeson's opinion was a decision that was ultimately reversed. And when you read the opinion in the Second Circuit, the Second Circuit was critical of the lower court opinion, remanded it and gave him instructions of how the opinion should be approached. And DPWN was a plan discharge case, it wasn't a 363 case and involved a claim extinguishment circumstance. And when you deal with the plan discharge and the bar date case there's something that's fundamental which is that the person who allegedly didn't do what was correct from a due process viewpoint is trying to take advantage of that and say that that claim is otherwise barred. So the person who's being accused of doing something wrong is now trying to hide behind the fact that they did something wrong.

In the 363 context when someone is going against the good faith purchaser for value, that construct doesn't hold anymore. The purchaser didn't do anything wrong. The purchaser was the good faith person who actually paid money, is the bona fide purchaser and that's why those cases are not necessarily matching up to the 363 context. It really is essentially saying that a debtor shouldn't profit from hiding its role in an antitrust conspiracy.

But when you slice and dice the Second Circuit opinion from the District Court opinion, there are two things that I think are relevant. One was the Second Circuit saying a debtor will normally be less likely to be charged with knowledge that it has violated the law than it has when it owes money unrelated to a law violation. There the letter Second Circuit is saying that it's easy to figure out whether you were reasonably ascertainable in the contract context where you actually have books and records showing the liability. It becomes much more difficult when you're dealing with violations of law which are in the nature of a tort.

And then, which I think is highly relevant, the Second Circuit also said, and this is why I think you can read in that they were being critical of the lower court, whether due process required United to give DHL explicit notice of an antitrust claim should not be decided that the

appellate level before the District Court has considered these matters under appropriate standards. So there the Second Circuit was saying I know you looked at this as a focus as to whether United should have told the claimant something. I'm not sure whether that's right. I'm not ruling on that issue. I've given you my guidelines of how you should approach this issue. Go back and figure out whether there is a cause of action that exists and there it was done in the context where the Second Circuit said they filed an inconsistent pleading and your Honor you should have taken into account that they may not have stated a cause of action.

So that I think is the relevant part of the DPWN case that I wanted to point out to your Honor.

In the Excel Concrete case, there a known secured creditor did not get notice of the sale. They actually sent it to the wrong attorney and it was determined that the proceeds were not sufficient to cover the lien. The trustee who was presenting the case to the Court misrepresented to the Court that the sale proceeds were sufficient to pay the lien and that the purchaser -- and that he and the purchaser found out that that was not the case before the sale closed. So the title company closed the situation even though the lien wasn't sufficient -- the proceeds weren't sufficient to satisfy the lien and even though they had told the Court

that that was wrong, they told them an opposite thing and nevertheless the title company closed and the purchaser in that case was deemed not to be a bona fide purchaser. And that's why the Court said this is not Edwards. Edwards dealt with a bona fide purchaser situation here. Here the purchaser was not a bona fide purchaser. I don't have to protect that person in the context of an appeal.

The Folger case. The Folger case was a situation where the purchaser bought accounts receivable and sued a prepetition account debtor. The account debtor wanted to defend by saying he had a recoupment, an affirmative defense to the claim that was being asserted. The purchaser said I bought this free and clear of liens and claims, I strip you of your recruitment defense and there the Court said that's not true. The notice of sale didn't say that affirmative defenses were being extinguished by the sale, it only said interests and therefore no relief like that was ever authorized.

This was a case where the Court was basically saying that account debtor can assert its defense because I didn't strip them of that right in the 360(f) sale.

Koepp, that's the recent Second Circuit case. That's not a Bankruptcy Code case. That's a railroad reorganization case under Section 77 of the Bankruptcy Act. There the creditor held an easement of record, but got no

notice of the plan which attempted to extinguish the easement. The Court said that the relevant order that dealt with this was the consummation order and the consummation order could not extinguish this encumbrance since the easement holder was not a claimant or a stockholder and the consummation order only applied to holders of such rights. So there the court was saying that the order that I entered didn't extinguish something. It didn't have to delve into a due process type right.

Metzger --

THE COURT: Stop on Koepp for a second because Koepp is cited by your opponents at two levels and you dealt with one of them. But they also cite it for the proposition that to relieve somebody from an order of that character you don't have to seek 9024 and 60(b) relief. Do you have anything to tell me on that other prong that they're arguing?

MR. STEINBERG: Yeah. I think that that's true in Koepp because they didn't have to do it because the order didn't authorize the relief so you didn't have to set aside the relief.

THE COURT: So your point is that because the order didn't cover it you didn't have to blow away the order.

MR. STEINBERG: That's correct.

THE COURT: Okay.

MR. STEINBERG: Metzger. There a county with a covenant that ran with the land as to a land development was a known creditor entitled to direct mail notice which was not provided. There was nothing in the case indicating that there was publication notice. The purchaser was arguing that the covenant was wiped out by the sale. The sale proceeds couldn't address the issue about whether the land development covenant existed or not. The Court found that since the purchaser knew about the covenant it really wasn't a bona fide purchaser at the time of the sale. Not our situation.

National Pipe, and this is a case where I actually think you need to understand the dynamics of what was going on in this case. There the bankruptcy court, the bankruptcy judge was extremely annoyed about what happened here. A known --

THE COURT: Is this the Peter Walsh case?

MR. STEINBERG: That's correct. There a bankruptcy judge, there in that situation a known creditors who had actually sued the debtor prior to the sale and would have been on the top 20 claims if they had been listed did not get notice and the court said that that person should get notice. Now it affected a remedy as against the purchaser. But the reason why it did that was that under

the plan that the debtor had, an indemnity fund was set up vis-à-vis the purchaser. If claims had been made against the purchaser, the purchaser had the right to make a claim against the indemnity fund.

The claim that was at issue here was less than the remaining proceeds in the indemnity fund. So what the judge did when he knew he was ordering this decision because he granted both relief at the same time, said you could make a claim against the purchaser and I'm letting the purchaser make the claim against the indemnity fund and now go figure it out. And what happened was the case was settled for an amount that was taken out of the indemnity fund and the purchaser didn't pay anything except it got some of its legal fees reimbursed. That's what actually happened in National Pipe.

Ninth Avenue v. Remedial. Creditor was at least an unknown creditor. That's what the Court determined. So that the publication notice was fine. The issue in that case was whether a CERCLA claim arose after the sale because that was when it was discovered and if so it would be binding on the purchaser. Notably if the creditor could assert a claim against the debtor that would have protected the purchaser and since the plaintiffs here argue that they were known creditors, this case actually supports New GM's position.

Reinert. It was a Section 363 sale notice and it said it did not say that it would sell free and clear of specific domain names and that the claimant asserted ownership in certain domain names. The Court said that the sale order did not determine ownership of the domain name so that the claimant was free to claim ownership to the assets after the sale. That's essentially the same thing as what I was saying with Koepp. There the Court was saying I don't have to touch my sale order because my sale order didn't strip anybody of these rights.

THE COURT: Because it didn't cover it in the first place?

MR. STEINBERG: That's correct. And then the last one I want to talk about is Savage Industries. There, and I think your Honor is familiar with this case, no notice of any kind, including publications, was provided for the sale. The court did not approve the sale terms or the no successor liability finding and therefore the sale procedure was so deeply flawed and the order itself not covering successor liability that there was no reason to enforce the sale order against the claimant.

Your Honor may recall that in the -- at the sale hearing in 2009 objectors tried to argue Savage Industries to you and say that this falls within the rubric of Savage Industries and your Honor quickly went back and said that's

not our case here. We have publication notice. It was widespread.

THE COURT: You're being too kind. I don't remember that back and forth. Was that something I addressed in the opinion or do I need to go to the underlying transcript?

MR. STEINBERG: I think it's in the transcript. It's in the transcript and if your Honor at some point in time we'll -- we can provide you the citation to the transcript. But Savage Industries --

THE COURT: And that was in the back and forth in that case kind of like I have with all of you guys?

MR. STEINBERG: That's correct. It was I think Harvey Miller said something in response and then your Honor picked up on that as well. So the argument -- Savage Industries was clearly a case that was discussed at the sale hearing and the case doesn't get better with age. It's the same issue and the same reason.

Now, your Honor, we highlighted two things yesterday that would allow you to decide these issues without regard to the reasonable ascertainable due process issue. In effect to sort of decide these issues on other grounds and I just wanted to quickly tick them off because I think it's important to know that you don't necessarily have to jump into the weeds on the reason ascertainable issue if

you don't want to.

One is that we argued that there was no due process violation because there was no property right extinguished by the 363 sale and we gave four reasons for that. Just to quickly tick them off, a 363(f) sale doesn't extinguish a claim, sales attach to the proceeds of sale. Two, we've cited to you and your Honor had expressed some reservations about it, but we cited to you the Emoral case which relied on Keane which was a Southern District case which said that it's a bankruptcy estate asset and therefore the debtor had the right to give it up as part of the sale process.

Third, we highlighted to you federal preemption argument which was clearly set forth in White Motor and was alluded to in your sale decision in footnote 99 and four, we said that as a matter of fact and law your Honor had determined that there was no successor liability claim because there was no continuity of ownership and that with regard to the product line exception, that doesn't apply to economic loss claims or would apply to pre-sale accident claims.

And there I would just like to point out that in the case of Conway v. White Trucks 885 F.2d 90 (3d Cir. 1989) the Court sort of dealt with this issue when it said that if you add -- and it was dealing with the Pennsylvania

product line exception, said that if you could have made a claim against the seller here, you don't have an ability to go against the purchaser and in this particular case clearly everybody who was a plaintiff in this case had the ability to go against the seller. They had the ability to go against the sale proceeds, make a claim. Whether they did it or not and whether there was a problem in that, that wasn't a New GM issue. That was strictly an Old GM issue, Old GM presented the bar date. Old GM was responsible for the notice of what was there and Old GM dealt with that. It's clearly not something that New GM was dealing with.

The second thing I said which allows you not to deal with the reasonable ascertainable issue is the prejudice point and I think, your Honor, there you and I when we were talking about this thing, I actually think we were saying the same thing, but we were saying it in a different way and maybe the best analogy was, and hopefully I'm right when I say this, is that I was saying it was an element of the claim and you were saying I could see it as a remedy, but not as the process. And I guess the way that I approached it was that when I think of a claim I think of the liability aspect of something and the damage aspect of something.

So, if someone had a due process violation that's technically a --

THE COURT: So you're focusing on the partly metaphysical distinction of whether for it to be a dup violation it's got to be a violation end of discussion or whether the prejudice, which I would consider as the second thing that needs to be addressed, although Mr. Weisfelner argued to the contrary, is part or not of the initial failure to provide due process conclusion.

MR. STEINBERG: That's correct, your Honor. I looked at it as if I were litigating a case I would sometimes argue to a judge there were no damages. That's the equivalent of saying no prejudice. You could have argued that there was a liability, the plaintiff didn't suffer any damages and therefore they have no claim. So I wasn't slicing and dicing it the way that you were, I was just saying that when you consider the issue overall you have to consider prejudice and we cited so many cases in our brief that talk about the prejudice. And, your Honor, when you approach this issue at various points in time after the sale also used prejudice type concepts.

So, in the Morgenstein case, which your Honor had, you noted that the result in the plan would have been the same even if they disclosed another product defect. In the Robley matter you said that the publication notice guarded the attention of objectors who made the same argument that Robley counsel would have made, the prepetition accident

plaintiff's cases.

Your Honor was introducing the concept of no prejudice here for purposes of analyzing whether there was an overall due process argument that was made.

THE COURT: Let's go with that for a second. If I agree with you that prejudice has to be shown before I grant any relief for a due process violation, the distinction you just articulated doesn't matter. But if I were to agree with Mr. Weisfelner that I can and should grant relief solely on the basis of finding a due process violation without focusing on whether or not it makes a difference, then the distinction you're talking would make a big difference.

MR. STEINBERG: That's correct, your Honor, and I'd like to be able to show you a couple of the no prejudice arguments that will illustrate why I think I'm correct on this on its most basic level. And I think it was established yesterday because no one refuted it and I think it's clearly true.

If the plaintiffs didn't get a direct mail notice, but because of the publication notice, the fact that they may have been trade creditors or shareholders so they got notice otherwise besides being a vehicle owner, if they got direct mail notice or they were aware of the sale hearing because of the publication notice or the media coverage,

then what was the prejudice? I understand they talked about you needed to specify the notice, but what's the difference whether they should have gotten a mail notice or they otherwise were aware of the hearing and had the ability to show up?

That's why the cases when you read the cases they say well, if you knew about the hearing anyway, if you otherwise knew about it then you didn't have a prejudice and that's why I went through yesterday the distinction when they cited the cases that talked about merely being aware of the bankruptcy filing doesn't give you awareness of the bar date. Well, that's true because the bar date sets a deadline for the extinguishment of a claim and merely knowing that there's a bankruptcy doesn't tell you that a bar date has been entered.

But that's not the same thing as if you were aware that there was a sale hearing. If I knew that there was a sale hearing and I could have shown up and I chose not to show up then there's no prejudice and that's an element of why I believe prejudice is an element of establishing due process.

The argument that we made about no prejudice that if they had shown up they wouldn't have said anything about successor liability that your Honor hadn't heard. One of the questions that your Honor had asked was what would you

have told me that was different? There was nothing that they said that was different. There's nothing new to say.

That's an element of no prejudice which is if you weren't going to say anything new -- that's why you see in these cases that said if I had given you notice what would you have said? What would have been the difference as a practical matter? And if you can't articulate what the difference was that would have in effect in any way change the view then the ruling wasn't going to be --

THE COURT: Well, if I heard Mr. Weisfelner right he was not arguing that it would have changed my legal analysis on the successor liability issues. He was arguing that if New GM had revealed to the world how bad its guys had acted it would have created such a Congressional uproar that Congress would have pressured Treasury or Treasury would have felt so reluctant to assist GM that the whole case might have been different.

MR. STEINBERG: Well, I think that if you want to -- that was the other element which is that if the recall had come to light just before the sale or during the sale process and there was this massive safety defect that had to be dealt with and that was going to impact what the purchaser otherwise would have to pay because the purchaser was taking on the recall covenant, the purchaser could have backed out of the transaction I assume. And if that's the

case where does that get them? Right? What happens in this case if this purchaser walks away from the transaction? That's another element of no prejudice argument which is that if they had shown up and opposed the sale and opposed the no successor liability finding and the sale hadn't gone through they would have been in a worse off situation than they are now. That's another reason why the no prejudice affects the due process argument.

The other thing, your Honor, is that no prejudice is illustrated by the fact that the notice actually attracted hundreds of objections and the arguments that they're making now were made by people exactly the same and your Honor considered them as part of the sale hearing. So, the first thing on successor liability was that the creditors committee, the fiduciary for all of the unsecured creditors including the plaintiffs, the fiduciary that had three tort creditors on their committee of 15, they filed an objection objecting to the no successor liability finding. They ultimately agreed at the end when there was a change that was made to support the sale. But they were trying to fight that throughout the process.

The Center for Auto Safety filed an objection. They are a not-for-profit entity that provides consumers with a voice for auto safety and quality. That's what they have on their website. They stated in their objection that

the sale process should not release consumer claims for losses as a result of defects in Old GM vehicles. They argued that New GM should assume broader warranty-related claims and not be shielded by successor liability. They claimed it was unfair to apply the no successor liability finding to vehicle owners who may not realize they had a claim against Old GM as of the sale hearing.

Their objection was overruled and their argument was also raised on the appeal of the sale order in Campbell and was rejected. There were over 40 states attorney generals who showed up opposing the no successor liability finding including the state attorney general of California who Mr. Esserman was talking about who filed another lawsuit against New General Motors and they objected to the sale. They argued at the sale hearing that New GM should take on liability such as implied warranties, additional expressed warranties, statutory warranties. They argued that the sale agreement divested customers of legal rights without regard to state laws that may when a claim is eventually be made be made to hold otherwise. They were essentially arguing the product line exception and their argument was rejected.

And this Court remarked in your sale decision that you well understood the circumstances of the tort claimants and that they could look to New General Motors as an additional source of recovery. If they could not look to it

they would get less. But the Court recognized that if New GM did not get this protection it would not close the transaction and the purchaser had the right to close which liabilities to assume as part of the transaction.

It's critical to understand that the no successor liability finding was not from the perspective of any individual creditor and it was not from the perspective of any objectors to the sale. So it's not a matter of conjecture of how the Court would have ruled if plaintiffs, as compared to the other tort claimants, had raised the same objection to the no successor liability finding. The result was intended to apply to all creditors, the known creditors, the unknown creditors and the future creditors and the result would have been the same.

And I remarked yesterday that the issue with regard to the pre-sale accident plaintiffs about expanding the sale -- carving them out from protection from the no successor liability was actually urged at the sale hearing and they tried to make their showing that the claims aren't that much and so why don't you just take them on and the government said no. And then we also made the point that the government had refused to pay economic loss claims and that if they were not specifically assuming warranty claims and tort claims, which are the retained liabilities, then it automatically follows that they were not going to assume

economic loss claims which are built on those foundations. The government refused to take on the class-action settlements which were economic loss claims. The Castillo case, the Dex-Cool case, the Soders case, those claims were fixed. In contrast, the government certainly would not have assumed economic loss claims, as now being asserted by the plaintiffs, which are potentially very large and have never been determined. And the government was never going to take on economic loss claims for the diminution in value of a car and leave the pre-sale accident victims out there. It was drawing the hard line of only taking on what was commercially reasonable.

So, your Honor, those are the four reasons why that the no prejudice element, that the fact that people argued the same points, the fact that no one is advancing a new argument on successor liability, the no prejudice is shown because they were otherwise aware of the sale hearing and no prejudice is shown because if they were right they would have had a worse result than they have right now.

All of those things determine why there was no due process violation because there was no prejudice. And you could either get it there directly because it's an element of whether there's a claim or you can get there because you decided to parse it through between liability and remedy.

I'd like to say a few words about the notice that

was sent by Old GM with regard to the sale motion. One, the direct mail notice that went out included every party who was in litigation with Old GM at the time. This included all pre-sale accident plaintiffs who were in litigation and thus any litigant suing Old GM with respect to its vehicle, in essence the active plaintiffs' bar at the time got direct mail notice of the sale.

THE COURT: Pause please, Mr. Steinberg, and if you were about to answer that next forgive me. Were any of the people who were suing Old GM back in 2009 suing for something other than a death or injury or property damage in a car wreck such as the economic types of loss that are now being alleged?

MR. STEINBERG: I actually don't know the answer to that, your Honor. I do know that in looking at some of the more recent complaints it seems that they sue for multiple reasons. But I don't have the answer.

THE COURT: Sure. But when you're in a car wreck you know it. We all know that people sue for things other than being in car wrecks. But I guess your answer was you don't know whether back in 2009 people had sued for stuff other than car wrecks.

MR. STEINBERG: Well, I'm sure that Old GM for things other than car wrecks because Castillo, Dex-Cool and Soders were those types of claims.

THE COURT: Oh, I see. And they got actual notice.

MR. STEINBERG: Yeah.

THE COURT: Okay.

MR. STEINBERG: In fact, your Honor may remember that was it Castillo that I argued that they got a distribution in the case and therefore they had chosen their remedy against Old GM and therefore that they're judicially estopped from pursuing. So there was a --

THE COURT: You'll have to forgive me. I've had 20 or 25 of these decisions now and they tend to blur.

MR. STEINBERG: Okay. So the second point is that besides now we're seeing the active form plaintiffs' bar, the sale notice also included anybody who filed a notice of appearance in the case. So, in this highly publicized case anybody who wanted to monitor it got direct mail notice of the sale.

And the Fourth Circuit in Vancouver Women's v. A.H. Robbins, 820 F.2d 1359, properly noted that a bankruptcy court approving a notice procedure must balance the needs of notification of potential claimants with the interest of existing creditors and claimants and bankruptcy estates' resources are always limited and the bankruptcy court must use discretion in balancing these interests when deciding how much to spend on notification.

THE COURT: What case were you reading from?

MR. STEINBERG: This is Vancouver Women's v. A.H. Robbins, 820 F.2d 1359 on page 1364 Fourth Circuit 1987.

THE COURT: Fourth Circuit.

MR. STEINBERG: Right. Now, Mr. Weisfelner said it was hard for him to do the math if you had applied it to 27 million vehicles instead of 70 million vehicles. If you accept my math in a very sort of rough basis if four million people cost, four million vehicles cost $3 million then 28 would cost $21 million so the cost would be around $20 million. You can quibble with me by $1 million, but that's roughly what it would cost.

THE COURT: All right, so in substance you were just working off of cost per million.

MR. STEINBERG: That's correct.

THE COURT: In terms of sending out mail notices.

MR. STEINBERG: That's right and that's the way it was priced in the Garden City application.

THE COURT: Your noticing agent, that's the way it billed?

MR. STEINBERG: That's right. The Old GM sale order was actually filed publicly on 8Ks so the original sale agreement was signed on a June 1, 2009 8K, the amendment was on the July 2, 2009 8K. So there was additional notice of the sale agreement and what was going

on by virtue of securities filings. The sale motion --

THE COURT: Pause once again. The proposed sale order, closely similar, but not identical to the one that was ultimately entered on the 4th of July weekend, was filed in the ECF docket on I think the first day of the case, June 1st. If not June 1st, June 2nd.

Was the proposed sale also part or an attachment or an exhibit to that 8K?

MR. STEINBERG: I think it was just the sale agreement.

THE COURT: The sale agreement.

MR. STEINBERG: That's correct.

THE COURT: Which provided for successor liability.

MR. STEINBERG: Provided for no successor liability.

THE COURT: Excuse me, for no success liability.

MR. STEINBERG: And set forth what the retained liabilities were.

THE COURT: Okay.

MR. STEINBERG: The sale motion when it was filed, the lawyers had said up front that it was not practical to serve all contingent creditors and the publication notice should be sufficient. And so when your Honor entered the sale procedures order you said that Old GM was not required

to serve direct mail notice to unknown creditors and that clearly pre-sale accident plaintiffs who had not commenced litigation or made a claim against old GM were unknown creditors.

Your Honor actually found that way in the Robley case afterwards. At the time of the sale as well as now Bankruptcy Court's for the Southern District of New York had established guidelines for bankruptcy asset sales. Your Honor had asked what should be the procedures. The bankruptcy judges of this district have actually tried to try to tell their practitioners what they think should be the procedures subject to individual judges modifying it.

And the guidelines at the time in 2009 set forth the notice procedures generally, who should get notice, and what the content of the sale notice should be. The orders that your Honor entered in this case were broader than the guidelines. You went beyond the guidelines. The guidelines don't actually say you have to notify by direct mail known creditors and the publication notice that was given here was to non-widely circulated people.

So when your Honor asked the question what should be the guidelines, the courts, the judges have told the practitioners they think as a general proposition the guidelines should be.

THE COURT: Do you know whether our present

guidelines are the same as those we had in the summer of 2009?

MR. STEINBERG: They changed, but I don't think they've changed in these points.

THE COURT: Do you have or do I have in have in the record is the better way of putting it, what the guidelines were back then? I assume I could take judicial notice of --

MR. STEINBERG: You could take judicial notice.

THE COURT: -- if they're available, but I don't know if we keep old guidelines on the website.

MR. STEINBERG: We can provide them to your Honor after we show it to the other side to make sure they're comfortable that we're providing the right guidelines. But we can do that after this hearing.

THE COURT: All right.

MR. STEINBERG: And I said your Honor had actually ruled on this notice issue in the Robley case and the Robley case is actually a very important case because it was a post-sale contested matter arising in the Old GM case. Robley was a pre-sale accident claim and who did not sue Old GM prior to the sale and the Court confirmed that Old GM was not required to send direct mail notice to vehicle owners who had not sued Old GM and that publication notice was sufficient. So your Honor actually had this issue, not in

the context of the ignition switch case, but you have this issue before.

The Court referred to the circumstances surrounding the 363 sale and that Old GM did not have the luxury of sending notice by mail to hundreds of thousands of GM car owners. I'm being passed a note that in the Robley case --

THE COURT: Talk into the mic if you would please.

MR. STEINBERG: I'm sorry, I was being passed a note that the Savage Industries case was actually also discussed in the Robley case that your Honor got, in the Robley transcript.

So, Robley I think is relevant here. The pre-sale accident plaintiffs in litigation, as I said, at the time of the sale received direct mail notice and that was approved by the Court. People refer to the Powledge matter here. The Powledge matter was a circumstance where not only did they get the notice, they actually filed a claim in the bankruptcy case. They actually went in litigation. They actually went to mediation. They actually got paid from the Old GM bankruptcy estate. So, pre-sale accident plaintiffs, and they're part of the group that Mr. Weintraub represents, they are people who filed claims against old GM, having gotten notice and actually have gotten a distribution.

The form of direct mail notice and the publication

notice was approved by the sales procedures order and that's significant. Your Honor in the Chemtura case said that bankruptcy judges look at the form of the notice and make a judgment as to whether it was reasonably calculated to achieve the notice that the Constitution and tradition concepts of fairness requires.

Now, you know, I know that someone could say that the concept of a computer is garbage in, garbage out, and I don't mean to try to foist this on you saying that -- I mean, you approved it based on the knowledge that you had. But it's significant for purposes of the cases that the notice that was actually, the notice in controversy, was approved by a court and was reviewed by the court and it was significant in this case in that that notice was never challenged by all of the objectors to the plan including the creditors committee. And it was never challenged on the claim specificity notice at all too.

Everybody recognized that that was appropriate notice. In fact I would challenge the other side to find me a 363 notice that has the Chemtura specificity of specific claims. I'm sure if it exists they would have put it in their briefing. It doesn't exist as far as I can tell and it would be crazy to do that in the context of this case because Old GM was selling free and clear of all of its liabilities, not just the liabilities of these plaintiffs.

So what would that notice have said about listing all the claims that were free and clear? What would it have said about listing all of the claims that would no longer be able to assert a de facto merger type claim? What would that notice have said? How long would it have taken? How much would that have cost? How much would that have delayed the sale? No one ever thinks that would make sense at all.

Judge Gonzales had the same issue, by the way, in Chrysler and there he had the publication notice for potential future tort claimants was sufficient from a due process perspective. The sale decision confirmed that the notice was proper. Paragraph E of the sale order says potential contingent warranty claims were unknown creditors entitled to publication notice. Economic loss plaintiffs held contingent warranty claims, contingent in the sense they had not brought their claims against Old GM as of the sale, contingent in that they were arguing that they had a latent design defect. The same --

THE COURT: Pause Mr. Steinberg. Does that suffer from the potential attack of the same garbage in garbage out expression used a minute ago?

MR. STEINBERG: Well, you know, I don't think so because when someone says that it's free and clear of contingent warranty claims, there's a recognition that those claims haven't been asserted and you don't know what they

are and they could be anything. And therefore when you're saying that with respect to those claims that publication notice is sufficient, then I think that that's the case.

I think if your Honor said does that bring me back to the reasonable ascertainable, reasonable foreseeable standard, that probably is true. You're probably back to say whether that was sufficient. It gets you back to that issue.

But the concept that at the time that you approve this you knew that you were approving publication notice for what would otherwise be latent design defects, potential recalls down the road, I mean, every car manufacturer does a recall at some point in time. They do it every year. I mean, New GM did a lot of recalls last year, but if you go through the history of recalls they all do it every year. It was anticipated that you could have this circumstance. It was anticipated that you could have a circumstance that related to Old GM conduct, the conduct of the Old GM employees and that's why paragraph AA of the sale order says that New GM is not assuming the conduct of Old GM whether it was disclosed or whether it was undisclosed. It just wasn't picking that up. It was getting that fresh start. It was not assuming those liabilities at all.

The claim-specific notice issue. Your Honor, you asked what the sale notice should have said and I think the

short answer is the sale notice properly said what it was supposed to say. The sale would be free and clear of claims, all claims except if it was an assumed liability. You didn't need to break it down to its components. It gave assets to the sale agreement which said that there was no successor liability. The sale motion described this as a special relief that was being requested there and it also defined what the retained liabilities were.

THE COURT: I understand the benefit of oral argument. I'm going back to review the briefs, particularly Mr. Weintraub's brief, because the question I had asked was based on I think page 26 of his brief.

He says that even if you had mailed the notice, if you spent the, what are we talking, $20 million bucks, is that what it would have cost to send out mail notice roughly? Mr. Weintraub says that even if you sent out mailed notice to everybody whose car was subject to an ignition switch defect, I presume like it was to the car wreck victims, it wouldn't have done the job because it didn't provide the information that the recall notices, if they had been sent out, would have provided.

That's a variant of what you're saying I think. Can you comment on that please?

MR. STEINBERG: Sure. One is that your Honor actually had this issue and decided this issue with the

Saturn plaintiffs' case. There the Court said that publication notice did not require the debtor to notify claimants about the problem in their car. If anyone had a problem with a failed timing chain he or she would have known then and could easily have filed a regular proof of claim in this case. The Court ruled that the quality of the 363 sale notice was not even debatable. It was unquestionably satisfactory and that was right. 363 sale notices --

THE COURT: That was one of my decisions?

MR. STEINBERG: It related to the Saturn plaintiffs --

THE COURT: Yeah, that was (indiscernible). I'm sorry?

MR. STEINBERG: It was in a transcript on February 10, 2011 and what I was reading from was on page 41, lines 16 to 42 and I think it was attached to our reply brief, right? So it was part of our reply brief.

But your Honor was right because 363 sale notices don't have this type of claim specificity. There's not a precedent that's out there that says that that's what you're supposed to do and that's because the focus of a 363 sale is not the quantification of the liabilities or the ability to assert liabilities. The purpose of the 363 sale notice is to notify people that there's a sale, that this is what

we're trying to do and to try to get the most people bidding on the asset and to try to get the best price. And there was no --

THE COURT: Pause please. 363 notices when they're done right have double or triple barreled significance. The main reason why we have notices in 363 sales, and you don't even have to have a hearing if nobody objects although of course I've never seen that, is so that the creditor community is comfortable that the existing captains of the ship, which are usually still debtors in possession, aren't giving away the store and giving away the estate's assets for too little.

But they also give the creditors of the world notice of what the 363 orders are going to say because I've never seen a 363 order, and there's a lot of people in the courtroom, I don't know if anybody left in here has been practicing longer than I have, they never say you're authorized to do this sale. They go on for five, 10 or 100 pages laying out a zillion conditions, protections and other things incident of the sale and I've always assumed that if somebody thinks the sale itself is okay, but thinks the order has offensive stuff in it he, she or it can complain.

And this is really a category II case. Nobody on the other side of your table contends that Old GM shouldn't have been sold. They're complaining about what the order

said. So, we can't wholly divorce ourselves, can we, from the fact that people might care about both halves.

MR. STEINBERG: Well, your Honor, I think that there are certainly circumstances were people do care about both halves. I mean, in the sale order there's probably five paragraphs relating to the TPC lenders which I was involved in which talked about how they would be dealt with as part of the sale.

THE COURT: Well, warehouses or something where the lien is attached to the proceeds who had a valuation fight on it?

MR. STEINBERG: That's correct. So there I think it is relevant. But here what we're talking about is successor liability. It was the condition to the deal. There wasn't anything to debate about what the order was going to say about successor liability. Either it was going to be in, that there was no successor liability. You're going to have paragraph 46 that said that there was no de facto merger, etcetera, etcetera or there wasn't going to be a sale. That was what was involved. This wasn't an aspect where there were nuances here and this wasn't applied just to hurt the plaintiff's bar. This was applied across the board. And this wasn't something that was hidden or debatable. There actually is no debate on successor liability. It was an up or down proposition.

And the reason why I focused on the fact that the sale hearing didn't try to quantify liabilities and therefore Mr. Weintraub's argument I don't think holds water, is that there was no evidence that was presented at the sale hearing as any specific contingent liability. There was no trial exhibit that was introduced to try to justify the sale on that basis and that after the sale hearing it's significant that when they did the bar date that there were 70,000 claims that were filed and 29,000 of those claims were unliquidated. People said they had claims, but they couldn't put a number on it. There was no attempt, it would have been ludicrous to try to deal with those issues at the sale hearing and the original claims filed against Old GM after the sale in the aggregate, and you get this information from the disclosure statement that was filed in this case, was $270 billion.

THE COURT: What was that? $270 billion?

MR. STEINBERG: $270 billion.

THE COURT: What's that? I'm sorry.

MR. STEINBERG: That the aggregate unsecured claims filed against Old GM as a result of the bar date.

THE COURT: So, if I hear you right, by the time of the bar date there were $270 billion of claims against Old GM. The 29,000 and 70,000, that's number of claims I take it.

MR. STEINBERG: That's correct. 29,000 --

THE COURT: And that's as of June of 2009?

MR. STEINBERG: That was the claims that were filed, there were 29,000 of the 70,000 claims filed that were unliquidated. They couldn't put a number on it.

THE COURT: I see and that's the number of claims that asserted in the aggregate $270 billion?

MR. STEINBERG: 70,000 claims asserted $270 billion of claims. 29,000 of the 70,000 claims asserted couldn't put a number on it.

THE COURT: Okay.

MR. STEINBERG: And your Honor may recall from reading the GUC Trust reports, the allowed claims in this case are somewhere between $32 and $33 billion. So there's been an 85 percent reduction or more of the claims that were filed. So no one was trying to tackle the claims. No one was trying to fix the claims. No one was trying to extinguish the claims and that was why I read yesterday the comments where Your Honor was saying that's an issue for another day.

So the argument about the -- should have been specific notice in the sale, because you needed to identify the claims, is I submit, irrelevant especially if the issue was relating to successor liability which was a fundamental, foundational element of the sale.

The other thing to sort of illustrate this point was that the purchase price actually had an adjustment feature that if the aggregate claims equal $35 billion or more there would be additional purchase price consideration paid by New General Motors. So, there was no attempt to figure out what the claims were, they didn't know. All they were saying to the creditor body is you're getting a pot. Augment the pot if the claims get to be too big, but we can't determine that now. That will be determined throughout the course of this case.

And there was no incentive to suppress claims as part of the sale. Old GM was insolvent by billions of dollars. Recognition of additional unsecured claims would not have created a further impediment for the sale. In fact, the more insolvent Old MS was the more compelling a case was for the 363 sale. And your Honor sort of said the same thing in Morgenstein when talking about the plan. It said if you had another product liability claims we were carving up the limited pot of assets. It wouldn't have mattered. People may have gotten a little less, but it wouldn't have changed anything and that would have been the same thing here because the government had offered an amount way beyond what anybody else would have paid. Because the government, and it came out in your sale decision, was paying not for the value of these assets, just the value of

these assets, they were paying for the impact on the domestic automobile industry, the need to maintain the national interest of having a domestic automobile industry, preserving jobs and trying to stem a severe recession at the time. This was part of government overall bailouts of certain industries to try reverse the worst recession that the country had exhibited since the Great Depression. So the government was paying an amount way beyond what anybody else would have paid.

And I think, your Honor, when you think about the claim-specific notice you have to think about the ramifications of other section 363 cases. If you accept Mr. Weintraub's view and impose a duty on sellers to tell people that they have a claim when their claim is not being extinguished that would be unprecedented. That would have cost, that would have delay. Ms. Rubin said you should use the Chemtura notice. Where? Who? Who actually has ever done that? What judge has ever required that? How impractical a solution would that be?

Let me turn to the remedy section. The remedy cited, the cases cited by the plaintiffs are readily distinguishable from the situation at hand because notice was extensively given and the Court approved the form of the notice and that's much different than the cases that the plaintiffs cite when there was no notice given for any of

the sale process and the New GM the government was a good faith purchaser for value. The designated counsel brief cites the U.S. Treasury as not being aware of the ignition switch issue so they've essentially, even with the benefit of hindsight, conceding the good faith issue. And what New GM did after the sale or didn't do after the sale is not relative to the good faith finding that the Court made as of the sale.

Mr. Weintraub read from Section 363(m) of the Bankruptcy Code to say that it protects the validity of the sale. And I think I have used 363(m) to talk about the rationale, the reasons for that to benefit bona fide purchasers. He put the period in the middle of the section. When the section goes on, when they talk about the validity of the sale they say that it's to the entity that purchased the property in good faith. So, it's not protecting the validity of the transaction. It's protecting the validity of the transaction to the good faith purchaser. The purpose of that section is to protect on appeal the rights of the bona fide purchaser for value. You need to introduce that clause to understand what the section is trying to deal with.

The plaintiffs in the GUC Trust believe that notice and a bar date of a Section 363 sale or equivalent, and I won't repeat again why for all the reasons I said

yesterday why I don't believe that's correct at all and that that Mullane's due process issues are for the particular circumstances and in Campbell they talked about the particularities and peculiarities of the Old GM case dictating what the due process notice should be.

The sale order specifically said New GM was not responsible for Old GM's conduct and it anticipated that there would be unknown claimants and future claimants that would be bound by the order. It's therefore unfair to fashion a remedy against New GM when the circumstances complained of now was expressly contemplated by the sale order. And we talked about before, and I won't delve into it much more, my simple proposition is that you can't have a partial revocation of the sale order and that there is no difference between partially revoking the sale order to make it inapplicable to the plaintiffs and entering a new order holding that the sale order is inapplicable to the plaintiffs. It's functionally the same thing and we're not writing on a clean slate here.

The plaintiff suggested relief would violate the integration clause of the sale order in paragraph 69 and it would violate the Campbell ruling which talked about you can't do elective surgery and you can't knock out the props upon which the foundational element of the sale was made.

And your Honor actually dealt with this in the

Morgenstein case in a different context. When you looked at saying I just want to be carved out of the plan and I want to have in effect -- and your Honor said that that's really a partial revocation of the plan and to say something else is really just a play on words and I would say that the same reasoning that your Honor did by sifting through what was being asked for applies here.

THE COURT: What did the circuit do in the Johns-Manville Chubb situation? I take it that there it was pretty clear that the order as it originally came out of Judge Lifland's court had covered by its literal terms in this era of plain meaning and textual analysis, all that stuff the Supreme Court tells us, had covered a claim of the type that (indiscernible) Chubb, but the circuit exempted Chubb from the application of that order even though it didn't knock out the entire order.

MR. STEINBERG: I think that my recollection of it was not that. I think the Second Circuit interpreted the order saying it couldn't possibly have tried to enjoin this cause of action and therefore it was never really intended --

THE COURT: But was that a diplomatic way of saying that nobody in their right mind could have included a provision of that character in the agreement or in the order?

MR. STEINBERG: I think they actually used words almost to that effect which was beyond the contemplation of anybody to have included that there. So, you know, it is what it is, but that's the way they dealt with the issue.

THE COURT: You're hitting on what would have been counterintuitive to me being a bankruptcy judge for 15 years and a lawyer for 30 before that. But when the circuit tells me that something's okay I listen to the circuit.

MR. STEINBERG: Well yeah, I think if your Honor was to hold that what they're asking for now was beyond what you had found in the sale order and that you couldn't have contemplated that you were releasing successor liability then you'd have to deal with the Chubb analysis. I don't think you have -- you don't have that there. Your Honor was explicit when you're dealing with successor liability. You were explicit about who it would be applied to. It was applied across the board to anybody and therefore I think Manville IV doesn't apply to this case at all. Manville IV is predicated on remedies because they claim that they couldn't have been contemplated at the time of a plan injunction and that's not what these plaintiffs are saying. These plaintiffs are saying I was a known creditor and I should have had direct mail notice. They're the polar opposite of the people complaining about in Manville IV.

And Manville IV has the issue that the injunction

-- by the way, the Campbell case says plan injunctions are different than injunctions under a 363 sale. They're meant to accomplish different purposes. The 363 sale has the bankruptcy policy objectives of trying to give certainty to the purchaser, finality in trying to achieve the best purchase price, not necessarily involved in the same way in the plan injunction. But beyond that the sale order clearly tie into the res. The injunction that your Honor gives in a 363 sale is protecting the person who's buying the asset. In the Manville IV case they're saying you enjoined the claim that was a direct claim between one insurer and another insurer that existed prepetition and that you had no right to do that, it was beyond your jurisdiction to do that.

There's no question you have jurisdiction to issue a 363 sale injunction. In Manville IV they said they couldn't have issued that injunction from the beginning and therefore it was beyond their contemplation.

The issue as far back as in Factors' & Traders, which is a Supreme Court case from I think the 1880s, understood that when you deal with a sale order it's not possible to in effect give partial relief to some people and leave everybody else the same. It said that if you are going to vacate it for one lienholder you have to vacate it for all lienholders. And the fundamental element of that is

that it's unfair to give the plaintiffs the benefits of the sale order, the fact that we actually -- New GM is doing the recall now, the fact that we did glove box warranty repairs throughout this entire period of time, and then say they're exempt from the other provisions of the order.

And the cases are consistent that the plaintiff should not be in a better position than they would have been if notice had been given under the 363 sale notice. The Stamco case, the Fernwood case, the Transaction World Airlines case cautioned against providing these windfalls to people who complained of the sale.

And then one final thing about the remedy section. The GUC Trust unit holders argue -- will be arguing later about equitable (indiscernible). They say it's too late to fashion a remedy as against them. But you've heard Ms. Rubin say yesterday that there should be a remedy that's fashioned against New General Motors. I'm not sure how they'll be drawing the distinction as to why they get the free ride and we shouldn't, but it's clear that from New GM's perspective we are five and a half years since the sale, there have been billions of transactions that have been done by virtue of the 363 sale. The appeal of the sale order was dismissed as statutorily moot and equitably moot already. So, how they think that they get a free ride and those concepts don't apply to us will be a mystery to me,

but I'll be listening to that argument later on.

Finally, the Old GM claim threshold issue. With regard to the used car purchasers I'd like you to think about this example. If the Old GM vehicle had not been resold after the 36e sale, the owners claim would be subsumed in the pre-sale consolidated complaint. Claims therein are conceded to be retained liabilities. In other words, it's conceded that New GM was not responsible for maintaining the value of Old GM vehicles sold before the 363 sale. The fact that an owner decides to sell its used Old GM vehicle to another party in a transaction which did not involve New GM cannot transform what is otherwise a retained liability into an assumed liability of New GM.

Stated otherwise, the purchaser of a used Old GM vehicle from a third-party does not have greater rights against New GM than its third-party seller had against New GM. It's derivative of whatever the seller could give them.

The fact that used car purchasers are claims are really successor liability claims was further evidenced when Mr. Esserman talked about the causes of actions asserted against New GM in the post-sale consolidated complaint. Clearly New GM did not make representations or sell the Old GM vehicles to the used car purchasers or receive any of the sale consideration thus causes of actions that he talked about, like unjust enrichment, rescission, fraudulent

concealment, false advertising as set forth in the consumer statutes all deal with the point of sale event and that clearly has no merit to New GM who was a stranger to the used car sale transaction.

Under section 2.3 of the sale agreement, the definition of retained liabilities is everything that is not as an assumed liability. Ms. Rubin read from Section 2.3(b) to say that the purchaser is not assuming any liability of the seller and that's where she stopped.

The rest of Section 2.3(b) says that the purchaser is not assuming any liability of the seller whether occurring, accruing, before, at or after the closing. He contemplated the situation. The actual term liability is defined in the sale agreement to include unknown liabilities as well as undisclosed liabilities. Thus my argument, which was that there was no gap in responsibility as it relates to Old GM vehicles and that the parties specifically parse out who is going to be responsible for what aspect of an Old GM vehicle, was dealt with by the sale agreement. And no one tried to address paragraph 46 of the sale order. There paragraph 46 said that Old GM, except for assumed liabilities which don't apply, will not have a liability for any claim A, that relates to the production of vehicles prior to the closing date. And by the way, it doesn't use the term retained liabilities. It just says it

categorically -- New GM shall not have any liability for any claim that relates to production of vehicles prior to the closing date.

And it separately says New GM shall not have any liability for any claim that is otherwise assertable against Old GM. And clearly you heard from Mr. Weisfelner yesterday and --

THE COURT: The second one you were reading from, is that a continuation of 46 or it different?

MR. STEINBERG: That's also part of 46. So the sale order specifically talked about this, you're not responsible for Old GM vehicles. It confirmed my reading of the sale agreement. The sale agreement expressly contemplated that Old GM employees would be hired by you GM. It was one of the benefits of the sale. Section 6.17 of the sale agreement talks about that. It also says in paragraph AA of the sale order that New GM would not be liable for the conduct of Old GM and that protection applied for claims that arose before or after the sale that are based on Old GM conduct.

THE COURT: That comes back full circle to one of the things that I telegraphed was of interest to me yesterday. You said two different things or the language of the sale agreement says two different things or, excuse me, the sale order. I'm not sure if it's on 46 or if it's

somewhere else.

In the first you said New GM isn't responsible for anything that relates to and then I forgot how the words in between relates to and Old GM --

MR. STEINBERG: It says relates to the production of vehicles prior to the closing date.

THE COURT: Okay. Then the second one you said that New GM isn't responsible for --

MR. STEINBERG: Any --

THE COURT: -- anything that was the fault of Old GM or words to that effect.

MR. STEINBERG: That was otherwise assertable against Old GM.

THE COURT: Okay. You see how they're different?

MR. STEINBERG: Yes.

THE COURT: And if that distinction had been brought to my attention in 2009 I'm not sure what I would have done under those circumstances. I'm not sure today. I guess I can think it through.

MR. STEINBERG: Well, your Honor, there could be lots of claims that are assertable against Old GM that have nothing to do with the production of vehicles prior to the closing date. It could have been monies loaned.

THE COURT: Yeah, but that isn't what I'm talking about. It's suppose -- it gets back to some of the points

that Mr. Esserman was making about what he calls independent tortious conduct. If it is independent tortious conduct by New GM, but happens to involve something that was originally manufactured before the sale date by Old GM in some respects that's where the rubber hits the road.

MR. STEINBERG: Yes, but my argument, your Honor, is, and I think it's borne out by the sale agreement and the sale order, that unless it was covered by the glove box warranty or the Lemon Law or related to an accident or involved New GM having to comply with the federal laws relating to recall -- unless it fits within those buckets that there was no longer any responsibility by New GM for an old GM vehicle.

THE COURT: As a matter of contract.

MR. STEINBERG: As a matter of contract.

THE COURT: And then your opponents are contending that if they had shown up at the hearing, well they would have been arguing for the world, but for the more persuasive part of what they'd be arguing for they'd say limit to not sticking us with anything that was really defaultive of GM.

MR. STEINBERG: Your Honor, if there was a latent design defect, if the ignition switch was designed incorrectly, should have had more torque than it did, if that was the argument that was made and that was relating to an Old GM vehicle any claim that's derivative of that was a

retained liability. The government --

THE COURT: As a matter of contract.

MR. STEINBERG: As a matter of contract. The government wasn't taking that on.

THE COURT: All right, go on.

MR. STEINBERG: So, finally the covenant to comply with federal law relates to recalls and that's in Section 6.15 of the sale agreement.

THE COURT: 6.15 of the sale agreement?

MR. STEINBERG: Right. And Ms. Rubin was talking about that yesterday, 6.15.

THE COURT: The recall obligation.

MR. STEINBERG: Right.

THE COURT: And compliance with federal law?

MR. STEINBERG: That's right. And that's not part --

THE COURT: Pause before you go on. Excuse me. Is there a counterpart in the sale order?

MR. STEINBERG: Yes.

THE COURT: And the number of that please.

MR. STEINBERG: I'm going to have someone look it up.

THE COURT: Have somebody look it up. Keep going, but don't finish before you give me that.

MR. STEINBERG: The definition of what's an

assumed liability versus a retained liability is based on what's in Section 2 of the sale agreement. So a covenant in Section 6 doesn't affect what is an assumed liability or a retained liability. It's a separate independent obligation by the purchaser to comply with federal law. But it doesn't change the contract between Old GM and New GM as to what was an assumed liability or a retained liability. And so therefore a failure to timely make a recall for Old GM vehicles could not change what otherwise was a retained liability into something else.

And in fact when you look at the post-sale consolidated -- paragraph 17 of the sale order. When you look at the post-sale consolidated complaint, they actually don't make a claim for breach of Section 6.15 of the recall provision. They're not actually making a claim like that. Instead they try to do it in a more clever way. They try to say that there were consumer statutes and that the failure to timely recall was a breach of those consumer statutes.

But the substance of a retained liability with respect to Old GM vehicles cannot be transformed into a New GM liability based on this type of pleading. Consumer statutes cannot be used to create an alternate remedy against New GM for a retained liability, especially when the sale agreement Section 2.3(b)11 says Old GM is not liable for torts.

The sale agreement was clear as to what specific liabilities New GM would assume with respect to Old GM vehicles, parts and conduct. If the parties to the sale agreement had intended for New GM to assume this broad new category of liabilities based on the eventuality that there could be a recall in the future they would have clearly said so as an assumed liability in the sale agreement and they didn't do so.

Your Honor, I'm going to conclude with this. When we did the Trusky matter and your Honor was trying to give guidance to other courts as to how you interpret the sale order, we set forth what we were asking your Honor to do and so I'd like to list the six things that we think underlie the motions to enforce that we ask your Honor to do.

One, that the pre-sale accident claims are barred by the sale order. Two, that the pre-sale consolidated complaint is barred by the sale order. Three, that the economic loss claims for Old GM vehicles in the post-sale consolidated complaint are barred by the sale order and this essentially means the used car purchasers. Four, all governmental claims based on consumer statutes for Old GM vehicles are barred by the sale order. This includes the State of California claims and it should be noted, as I said before, that the state AG was an objector to the 363 sale, appeared at the sale hearing and we believe this is an end

run around what had already been determined.

THE COURT: Is this the one that was already before Judge Furman?

MR. STEINBERG: That's correct, where he remanded it back.

THE COURT: I beg your pardon?

MR. STEINBERG: He remanded it back. He issued a decision saying that the removal statute did not allow for this client to come into the MDL. So it's now --

THE COURT: Did he rule on the merits of whether any of the issues that are (indiscernible)?

MR. STEINBERG: The condition before -- the only issue that was before Judge Furman was whether removal was appropriate or whether it should be remanded. The sides had agreed before that that your Honor would be able to determine this issue and they entered into a stay stipulation so that your Honor could enter into a decision with regard to the motion to enforce.

Your Honor, we actually have this as a contested matter just to remind you where, you know, the procedure was. We designate this as subject to the motion to enforce. They have a certain period of time to file an objection and the State of California filed an objection saying I just want to be able to argue the remand issue. I agree to be abide by the stay. We stipulated that that would be

sufficient for a stay stipulation and then it was argued before Judge Burman.

THE COURT: Go ahead.

MR. STEINBERG: Item number five, substantial portions of the post-sale consolidated complaint are copied from the pre-sale consolidated complaint and they refer to numerous events that took place before the 363 sale with respect to Old GM's conduct. Paragraph AA of the sale order expressly provides that New GM is not responsible for claims arising in any way in connection with any acts or failures to act of Old GM whether that conduct was known or unknown at the time of the sale. To the extent that the post-sale consolidated complaint seeks punitive damages based on Old GM's conduct, that conduct is expressly barred by the sale order.

And lastly, all claims related to New GM vehicles where there was an Old GM part installed by a third-party that was unrelated to New GM when New GMs didn't sell that part to the third-party are barred by the sale order.

THE COURT: Can you qualify that by saying that New GM didn't provide an Old GM part to the --

MR. STEINBERG: That's correct.

THE COURT: -- to the mechanic?

MR. STEINBERG: That's correct. I qualify it by that. If New GM installed it or if New GM sold the part

that installed it we're not looking for protection from the sale order.

THE COURT: So you're now answering the question that bothered me yesterday.

MR. STEINBERG: That's correct. And this primarily relates to the early -- one of the early ignition switch recalls. With that, your Honor, I'm finished with my reply.

THE COURT: Okay. I'm going to give you a chance to surreply, Mr. Weisfelner or on of your allies. But let's take 10 minutes before we do that.

MR. WEISFELNER: Thank you, judge.

CLERK: All rise.

THE COURT: Have seats please.

MR. STEINBERG: Your Honor, I asked Mr. Weisfelner if I can just say two things to your Honor. One, on the Savage Industries case I was told by my colleagues that I may have merged the sale hearing to the Robley hearing so Savage Industries was discussed by your Honor at the Robley hearing on June 1, 2010 on pages 60 to 61.

And the other thing was with response to your Honor's question --

THE COURT: Pause. But not at the 2009.

MR. STEINBERG: Not at the sale hearing as far as someone could do a quick search.

The other thing was that the old guidelines for the sale is on the Court's website. It's a general order and it's specifically referenced in the sale motion. That's the notation I have.

THE COURT: The one that was made back in 2009.

MR. STEINBERG: That's correct.

THE COURT: Okay. Mr. Weisfelner.

MR. WEISFELNER: Your Honor, for the record, Edward Weisfelner of Brown Rudnick, designated counsel on behalf of the lead plaintiffs.

Your Honor, first I want to thank the Court for the opportunity afforded us to in effect I guess surreply. Your Honor, I will tell you that when I was preparing for today's session the focus I had was on three concepts; precedent, policy and prejudice. And quite frankly, I had not given a lot of additional thought to the notion of whether or not from a due process perspective the creditors at issue here were known or unknown or, as Mr. Steinberg argued for about an hour and a half this morning, whether they were reasonably ascertainable or reasonably foreseeable and the reason for that, and I presume it's my mistake, was that at the outset of yesterday's hearing, your Honor cautioned the parties that they should go ahead with the outline of their presentation with one exception and that was that there was enough to require a recall back in 2009

and that GM acted badly.

And, your Honor, as a consequence I took, and I think all of us took, a lot of our respective outlies out of the equation as we had intended to demonstrate as a matter of fact based on the record that's been established in this case, that's the stipulated facts, 179 paragraphs, the Valukas Report, that in point of fact what Old GM knew and for that matter what New GM subsequently knew as car manufacturers are reflected in federally mandated books and records. Those federally mandated books and records contain the requisite information to put those companies, each of them, on notice that there was a pervasive serious safety defect that they were required to report and recall and that as a matter of law, and in particular the cases cited in Valukas at about page 279, the DC Circuit cases U.S. v. GM, stood for the proposition that what a car manufacturer knows is a function of what it actually knows or what it constructively knows as a matter of law.

And I know that I incurred bit of your Honor's righteous indignation if not wrath when there were some elements of what GM's conduct did pre-2009 that could have been categorized as more salacious. And I appreciated that your Honor wanted me to back off or at the time I appreciated your Honor wanted me to back off, because again, I took your Honor's opening comments to say we're no longer

talking about whether these creditors from a bankruptcy due process perspective were known versus unknown.

If they had to do a recall, I assume my mistake potentially, your Honor was telling us that you're going to presume they were required in 2009 to do a recall. Then I thought then that meant automatically that for due process purposes as a matter of bankruptcy law these were known creditors and their due process rights flowed from whether or not in fact they were known.

Now, your Honor, I think I can, with your Honor's permission, correct my potential mistake about reading too much into your Honor's commentary about let's all assume that GM acted badly and were required to do a recall in 2009. And I'm not going to re-do the argument that I had prepared for yesterday, but rather than take your Honor through meticulous elements of the record that was stipulated to, I think it would suffice, if your Honor would allow me, to reference just a couple of provisions that I think are directly on point from the Valukas report and not the body of the Valukas report, but its very introduction.

What Valukas tells us is that the ignition switch-

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THE COURT: Let's make sure we're on the same page

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MR. WEISFELNER: Sure.

THE COURT: -- because I'm not sure if we are. You're starting correctly with my observation that New GM knew enough to have engaged in a recall before the summer of 2009. The legal issue, I don't understand it to be a factual issue, the legal issue -- as such at least, unless there are facts that enable me to bridge the gap -- is whether knowledge of the duty to make a recall is, as you contend, or is not, as Mr. Steinberg contends, knowledge within the meaning of the due process cases of whether creditors are known or unknown. And of course what we're talking about is not car wreck victims because they've already been taken care of unless Mr. Weintraub is right, that they have to know not just that they were in wrecks and that they had potential claims, but arguments they could make in connection with that.

Now, what are you trying to tell me here? Are you trying to focus on the precedents of whether knowledgeable recall obligation, which is effectively conceded, is the same or different or is it something other than the precedents that bear on that?

MR. WEISFELNER: Oh, I think that the knowledge of the need to conduct a recall is as a matter of fact and law for due process purposes the equivalent of the concession that these creditors were for bankruptcy and due process purposes creditors at the time of the 2009, were known

creditors, reasonably ascertainable and that the ability to give them notice in terms of knowing their addresses and where they lived was reasonably ascertainable as a matter of bankruptcy law, due process in a 363 context.

And let me just give you one of the quotations out of Valukas I think bears directly on this point. And maybe before I do that let's take a step back and appreciate something. So, it's the 2009 hearing and GM comes in on this hypothetical and says your Honor, we just want to make sure that you're aware before you approve the notice that we've just conducted a recall and the recall we're conducting is as to the ignition switches. They're bad. The torque is way below specifications and it's a safety recall because if it runs -- turns into the accessory or off position these cars will stall, you will lose power steering, you'll lose power brakes and the airbags, if you were involved in a crash, will deploy making your accident that much more severe.

What would have been the entitlement of the plaintiffs at that point? Not necessarily a monetary damage amount for economic loss. The plaintiffs would have said had the defect been disclosed I'm entitled to a new part. I'm entitled to an ignition switch that works and all of the attendant costs associated with you replacing my bad ignition switch.

THE COURT: We're talking -- you're saying in substance that even though they could have been claimants for $50 or $100 or $200 but whatever it takes to replace the switch, if GM doesn't do it for free it still makes them creditors.

MR. WEISFELNER: Well yeah and not only that, judge, but there are all sorts so attendant damages that, again, I think are better discussed and adjudicated in front of Judge Furman. But the point is if they would have come to you as you were considering and contemplating the notice to go out and said well, you know, we have a number of cars and the number of cars is about 12 million that have a safety problem in them and we're going to do a couple of things. We are going to replace those parts, that that wouldn't have been enough. The other thing they would have had to do was to afford, as an example, someone who's got this defective part the opportunity to rent a car at their cost.

This is a known safety defect. If I continue to drive the car with this ignition switch, chances are I could be involved in an accident where my airbags don't deploy and I die. So guess what, I'm not driving this car anymore and GM, give me a rental car. Come pick up the car. I'm not driving it to the station. I'm not driving it to the repair center.

My point, your Honor, is that, and maybe it was a mistake, when we made the connection between this is a safety recall that GM should have done where the conclusion is a matter of due process and bankruptcy law, that that meant your Honor was telling us that you don't have to argue that these were known creditors from a bankruptcy perspective.

What Valukas tells us in the introduction to his report is the following. Investigators at Old GM were neither diligent nor incisive. They quote -- and this is the important part -- "failed to search for or obtain critical documents within GM's own files or publicly available documents that linked the ignition switch defect to airbag non-deployment."

You heard a lot from Mr. Steinberg about what are the right books and records, notwithstanding Drexel's comments about pennies on the floor, remember this is a car company. A car company by federal law and regulations determines whether or not it has a safety defect and as a consequence if it's sold to a car with a safety defect you are a creditor. You're a known creditor. And GM is to determine whether or not it sold you a faulty car with a safety defect by looking at its books and records, the ones that the federal law tells them they have to maintain -- the TREAD database, the PTRS database -- not their ledgers, not

their accounting books and records, but the records that the government tells a car manufacturer these are the ones that you've got to retain.

They failed to search for or obtain critical documents within GM's own files or publicly available. He goes on to indicate in his introduction, Valukas does, that GM failed to take certain basic investigative steps and the introduction to the report concludes that many individuals have substantial responsibility and that committees and groups failed to demand action in the face of mounting injuries and fatalities, to make themselves or others accountable and, this is the again critical part from a due process perspective, to "marshal the information and expertise at their disposal."

GM had information at its disposal. Information it was required by federal law to maintain which told GM or should have told GM or GM was on constructive knowledge that it was selling product with a known safety defect and yet it didn't disclose it. And, your Honor, I think that that permeates much of Mr. Steinberg's argument, and I want to get back to the point I was going to raise which is precedent, policy and prejudice. But we heard a lot about what the contract, the agreement and the effectuating order provides. And I was struck with the conclusion that so you mean to tell me that you can contract away the result of a

due process violation. You can contemplate what a litigant might have already -- might have said had they been afforded due process and just contract away the result so that you have an order that gets entered that you have no opportunity to contest or talk about, but if it got entered whether you had due process or not doesn't really matter. That can't be the law.

Your Honor, let me go back and start where I was going to start today before I heard a whole new argument about whether these plaintiffs were known and unknown and start with precedent and policy considerations. And, your Honor, I understand and I appreciate that this is an important matter and that 363 has important policy considerations for bankruptcy cases, bankruptcy practitioners, people like me that make their living in the bankruptcy context. Very often we find cases where companies do need to in a very quick fashion undergo a 363 sale to avoid wholesale liquidation and this case is even more dramatic because we literally had the U.S. auto industry at risk, as the record clearly demonstrates.

But in terms of setting policy and precedent it's terribly important that we all keep in mind that we are talking about a car manufacturer and in my generation, and maybe for many successive generations in the future, certainly in the past we've had all of two -- count them,

two -- car manufacturers that have gone through Chapter 11 in the context of 363 sales. The specific and unique facts and circumstances of those two car company cases will not, I assert, set policy for 363s generally and there's a reason for that. The facts in this case, as opposed to Chrysler, the facts in this case demonstrate that the debtor, GM, knew that there was an ignition switch defect, knew that it was a safety probably, knew at the time of the sale that it had an absolute obligation to change out the part and or accord damages or recognize damages on account of the plaintiffs which may ultimately have to get dealt with later on in the case.

THE COURT: Pause please, Mr. Weisfelner.

MR. WEISFELNER: Certainly.

THE COURT: I infer from what you just said then that as you try to harmonize this case with 363 law generally and what needs to be done under 363s, that if New GM had prior to the June 1st 2009 Chapter 11 filing the notice it gave out then by publication, if it had issued the recall notices required under law that would have skinned the cat in terms of notifying the world.

MR. WEISFELNER: I think it would have gone a long way towards skinning the cat, yes your Honor. First of all it would have effectively put people on notice of two things that didn't happen in this case when you talk about

prejudice.

Prejudice number two, I'll get back to prejudice numbers one and bring it closer to the 2009 sale, but prejudice number two, the ultimate prejudice in this case and I think it's completely disingenuous and artificial to separate what happened in 2009 when your Honor approved the sale from what ultimately happened when there was a bar date set in this case and from what ultimately happened in terms of distributions to general unsecured creditors.

The same problem that affected the sale, affected the ability of people to make claims on the proceeds of those sales, to have their legitimate claims attached to those proceeds because the cover up, GM's failure to give notice of the ignition switch defect presenting a known safety hazard which killed scores of people and injured scores of people pre-sale were never disclosed as of the bar date. So the ability to attach to those proceeds didn't exist and I'll go through some statistics on that in a second.

Pulling back through the prejudice associated with what happened in front of this Court at the 2009 hearing, now, Your Honor, we talked about prejudice in a couple of different ways. I'm going to try it one more time to be specific, because I think the elements of prejudice are multiple. Number one, we argued that the cases tell us that

you're not supposed to do a hindsight, look back or speculate as to what might have happened. But let's assume that Your Honor believes that such hindsight or speculation would be appropriate.

Well, Your Honor, we have the US Treasury. The US Treasury is in there, recognizing the interests, the national interests of keeping this car company alive, keeping the industry functioning, for the benefit of employees, customers, supplies and the whole universe of affected parties. And Treasury drew a line in the sand that said, "We will only allow new GM to assume those liabilities that we think are 'commercially reasonable'."

And then I think about the Feinberg protocol, and as Your Honor knows, the Feinberg protocol is a voluntary program - I put the word voluntary in air quotes, the record couldn't reflect that my fingers were going like this - but it was a voluntary program that new GM put in place through Ken Feinberg, which is already recognized, I think the number is 56, pre-sale death claims, and I forgot the exact number of pre-sale injury claims, and there are hundreds of pending claims, still pending in that hopper.

But we all know that GM's contention is -- new GM's contention is, the sale order bars all those claims. New GM is undertaking the Feinberg protocol why? I suggest to you that they're undertaking the Feinberg protocol

because they recognize that there is a public perception problem, a Congressional inquiry concern, an Attorney General ongoing investigation, both criminal and civil investigations, and that providing this pot of money for people who might otherwise be barred under their interpretation of the sale order, is a good "commercially reasonable thing for them to do" to protect, preserve and enhance their brand, after this firestorm of negative publicity.

Well, Your Honor, if GM after the fact, reaches the conclusion that opening up the floodgates to pre-petition claims -- and by the way, only if they comply with the Feinberg protocol, so it's not like they're saying, "Hey, listen, if you had a pre-petition death or accident, we're paying you." It's, "If you had a pre-petition death or accident and you comply with the Feinberg protocol, we'll pay you the amounts that we want to pay you," but they're doing that because they say it's commercially reasonable.

Well, now, I'm supposed to take my time machine, go back to 2009 and the question that you're being asked is, if we laid this out for Treasury, I could take Harry Wilson, who is no longer asking GM to spend $8 billion of its $25 billion dollars cash on its balance sheet, to make distributions to shareholders. I know have Harry Wilson in front of me, who's a member of the task force, and I say,

"Harry, come on, you want to preserve GM's commercial ability to move forward, enhance the brand? You've got to give me a carve-out for these specific claims. Not any warranty claim, not any defect in the car that may arise in the future. A known safety defect that's killed people, that rendered these cars basically undriveable if people knew what was wrong with them. Harry, you've got to give me a carve-out on this one, because if we go into the Court in front of Judge Gerber, he may force you to give the carve-out."

I don't know what Harry would have said when he went back to Treasury and the rest of the task force. I don't know what Your Honor would have determined, but I do know at a minimum, we're talking about old GM and the second after the 2009 sale order was entered, new GM both had recall responsibilities. That meant, you can't write me a check to satisfy my concern. You've got to replace the part. This is a dangerous part. Replace it.

And I don't know what Your Honor would have done in 2009, had they bothered to give me notice of a known safety defect. I want to make sure that we have the math right, because Your Honor has gotten all sorts of representations about the math. I don't know why it matters, but we talk about the cost of doing some sort of direct notice. And Your Honor, I'm not going to argue

Garden City, and I'm not going to argue what was in their fee application. Your Honor knows or could take judicial notice of the fact that Garden City has a profit margin built into --

THE COURT: Well, I take it you have a more fundamental point, and clearly, whether it makes some of the other facts moot or not, if I heard you right, and I don't think I heard Mr. Steinberg dispute this portion, you have a statutory obligation to send out recall notices at some point, and is your point as simple as, if new GM has to do it -- excuse me, if old GM has to send out those recall notices anyway, the incremental cost of supplemental mail notices aren't all that important?

MR. WEISFELNER: It's that, but Your Honor, also, you were given some figures that just don't make any sense. There are 70 million GM cars on the road. I'm not concerned about 70 million GM cars on the road. They recalled 27 million cars. I'm not concerned about 27 million cars. I'm concerned about the 13 million cars that have an ignition switch defect, which was a known safety defect, and by the way, of those 13, 3 of them, 3 million, are acknowledged to have been post-sale new GM-sold and manufactured, affected cars. So we had 10 million ignition switch affected cars, as of 2009, and if you do the algebraic math that 70 million would cost you 42 million, to give the right notice, even

with a built in profit margin, you're talking about $6 million dollars.

THE COURT: But help me on this, and if I'm seeing ghosts in the closet, correct me. You're not shy. I thought I heard arguments from either you or Mr. Esserman or both, that the contention being made on the Plaintiff's side is that the failure to deal with the ignition switches damaged the GM brand, and is some Court of competent jurisdiction then going to hear an argument that there are 70 million vehicles that lost value and not just the 27 million that are the subject of the recalls, or the lesser 13 million to which you just made reference?

MR. WEISFELNER: Your Honor, I will tell you that my input into this matter is focused, laser-focused, on the 12, 13 million cars affected with the ignition switch defect. I've read the two consolidated complaints. I'm not counsel of record there, but I guess I would be surprised if the Plaintiffs in those actions aren't likewise looking for recompense for the people without ignition switch defects in their car, on the theory, which may or may not be upheld by Judge Furman - I'll start using Furman instead of Court of competent jurisdiction - may or may not be considered by Judge Furman as giving rise to cognizable claims and causes of action.

I mean, I've read that as part of the complaint,

but my job is just to demonstrate to Your Honor that those people that were the subject of the ignition switch defect were known Creditors whose identity were reasonably ascertainable because there were Federally mandated books and records that GM was aware of, it wasn't a matter of foreseeability. They were known. You know when you sell a defective product to someone, you've given them a claim that sounds in the nature of money damages or, in a car company case, replace this part and all of the attendant damages that are associated with "replace this dangerous part".

And Your Honor, again, you know, we think about prejudice and we think about -- I think yesterday, you and I had a colloquy about who was looking to get a leg up, and frankly, I'm sensitive to the notion that, when you think about economic loss Plaintiffs and you compare them to other people that were impacted by GM's bankruptcy, economic loss Plaintiffs may not have the same sympathetic allure that some of Mr. Weintraub's clients do because they're either dead or seriously injured.

And Mr. Steinberg has made a lot of people driving eight-year-old cars that just have a switch that needs to be repaired, and it being hard to generate a lot of sympathy for those people. Well, sympathy as compared to whom? Sympathy as compared to new GM? Because it's new GM who's looking to enforce the order. Sympathy for new GM, when we

talk about the assumption that old GM was required to do a recall in 2009 because it new as a matter of law that there was a safety defect that impacted these cars, that were subjecting people to death and personal injury, let's not forget that new GM, for a period of approximately five full years, maintained the fiction that there was nothing wrong with those cars, continued to allow on the highways and byways of this country, cars that by definition, posed a serious safety defect to the general public.

It's new GM that likewise failed to determine, based on records it was mandated to maintain under Federal law, that these cars had to be recalled. And as Mary Barra has admitted, people did bad things and bad things happened, such that 17, I think is the right number, new GM employees were fired for misconduct and negligence relating to the ignition switch.

So again, let's balance the relative equities. I have economic loss Plaintiffs, I have new GM. I have economic loss Plaintiffs. Should they really do better than, for example, the bond holders, the trade Creditors, the employees who had their pension claims reduced, that are represented by the GUC Trust and the unit holders that are represented by Aiken? Is it fair for them to do better? Well, let's think about this. Had the bar date, or the bar notice, reflected what GM, both old and new, knew at the

time that the bar order was being prosecuted, then my constituency would have flooded the bar -- the claims notice with their claims.

THE COURT: You would have flooded it to a material extent, because $10 billion dollars of extra claims is certainly going to be something that gets the GUC Trust's attention --

MR. WEISFELNER: Especially since --

THE COURT: But -- forgive me.

MR. WEISFELNER: Sure.

THE COURT: But in the claims process, you don't get punitive damages, you don't get RICO damages, because there's well-established authority. I think I held this earlier in GM in the (indiscernible) opinion, that punitives in the claims context, in a liquidating plan, penalized the wrong guys. They penalized the innocent unsecured Creditors.

MR. WEISFELNER: Right, and Your Honor --

THE COURT: So you're talking about wager claims, but you're not talking about the claims of the full magnitude that we have here.

MR. WEISFELNER: And again, Your Honor, I would agree with you if we were focused on the nature of the claims, that the Plaintiffs, had they gotten notice, could have asserted against the residual estate. Your Honor, I

respectfully disagree with you, although I don't think it was your intention to tell me that the claims that the Plaintiffs could have served against new GM under the right theory, with the right proof, at an eventual trial, couldn't assert punitive damages.

But I agree with you that, as to the claims pool here, understand that - and you heard some math on this one too, but I think it's important that you know what the facts are - there was about $9.4 billion dollars of value in the, for lack of a better term, Creditor trust, as of March 2011. There was an initial distribution that took that number down to $1.2 billion dollars, that's as of December of 2011. In other words, 87 percent of the pot is gone. There was $843 million left, or about 9 percent of the pot left, at or about the time that the recalls were finally, finally undertaken.

And Your Honor, there was some dialogue yesterday about the November distribution. You should know, Your Honor, that that distribution was all of $240 million dollars, or about 2.6 percent of the initial $9.4 billion dollars. My point is that whatever our claims were, or would have been, with our without punitives, and I understand Your Honor's contention, it would have materially diluted the pot that was otherwise available for the GUC Trust beneficiaries, but more than just dilution, you have

the time value issue.

Your Honor knows, I know from other case experiences, that when you have disputed claims, the time and effort it takes to resolve those disputed claims, and I would venture to guess that the claims that would have been asserted by the Plaintiffs, had they gotten appropriate notice, which they didn't, might not have been accepted by the GUC Trust on the face value of it, and there would have had to have been a determination as to what the correct amount of those claims were.

My guess is that some lawyer or group of lawyers may have purported to represent them during the claims administration process and asked for a whopping reserve, and would have prevented any interim distributions to the GUC unit holders until those claims were resolved. My point is that, another, unintended beneficiary of the prejudice that befell the economic loss Plaintiffs, were the GUC Trust beneficiaries, who didn't suffer dilution from our claims, and didn't have to wait or spend the money to adjudicate our claims before they could make a distribution. Your Honor, when we talk about prejudice and we focused before on, what is it that we would have had anyone do differently, had we been here with appropriate notice in 2009?

I think the entire discussion that was had about the various provisions of the order, and what they did or

didn't do with respect to carve-outs and retained liability, makes my point. Let's assume again, as we started this hearing, with the presumption that old GM had a recall obligation, which it failed to perform, and it's recall obligation that had failed to perform for a period of approximately seven years.

In 2002, some people claimed that the knowledge dates back even before 2002, to when the ignition switch was first being designed and everyone knew that it didn't meet its torque requirements, but for an extended period of time before the 2009 sale was being considered, GM knew but failed to disclose, that it had a safety defect.

Now it discloses it at the hearing, because we're taking our hypothetical time machine back, because we're told that you've got to find some sort of prejudice as a pre-condition to showing a due process violation. We think this whole exercise doesn't make any sense, that's what Fuentes tells us, that's what other cases tell us, but let's assume we go through that exercise. I'm back in 2009. I don't know if it's me or Mr. Esserman or Mr. Weintraub, or some other bankruptcy lawyer representing the Plaintiffs, not the Plaintiffs who showed up in 2009 who didn't know anything about the defective ignition switch and that it was killing people and injuring people, but people who show up now to represent those people who have a safety defect in

their car.

Do you think we wouldn't be fly-specking the order to insure that whatever liability we thought, as a car manufacturer with an admitted safety defect, would need to undertake for the benefit of people who had the switch in their cars. Don't you think we would have had an opportunity right then and there to convince Treasury, if not Your Honor, that given their acknowledgement of putting defective parts on the road, we were entitled to protection in the order to insure that they were going to take the switch out. Give me a switch that works. Prevent me from falling into the same category of people that drove their cars into trees when their power failed and their air bags didn't deploy.

Lots of other things that I think effective counsel may have been able to achieve back in 2009, but we'll never know, because no counsel was accorded the ability to be effective, because no counsel was told, "Hey, we happened to sell 12 million cars with a defective ignition switch that, guess what, in normal conditions, could jump from run to accessory to off, no power steering, no power brakes, and don't worry about it, because any real man can restart the car and try and drive the car off the road."

But they now know it's a known safety defect, they

now know that it causes death and injury, but do you think that competent counsel may have been able to suggest to Treasury, “Listen, you’re setting aside shares of new GM and cash that have the value of $9.8 billion dollars. In order to make this thing work, now that we know there’s a safety defect, maybe you need to bump it up by $2 billion dollars.”

And maybe Treasury would have said, “Okay,” and maybe they would have given us the $2 billion in the form of stock, and maybe they would have given it to us in the form of additional warrants. I don’t know. We weren’t there. We weren’t given an opportunity to protect our rights and our interests. There’s a flex provision that says that if the claims are more than $35 billion, they’ve got to put in more money.

More money, by the way, equates, if I’ve run the math correctly, to about another $8- or $9 hundred million dollars. But you don’t get to the flex provision unless the claims go from the current estimate of $32, up to $35 billion.

Well, if someone as good as Mr. Weintraub or Mr. Esserman were there representing the Plaintiffs at the time, they may have succeeded in convincing Harry Wilson and the rest of Treasury to make the flex provision different. You would have added more value if the claims exceeded a lower threshold number. I don’t know. No effective counsel was

there because there was no notice. Your Honor, this is the problem with saying that, if you have a due process violation, you're not entitled to a remedy unless you show prejudice.

That's not what the cases demonstrate, but even if they did, how much more prejudice could we lay out for you? The inability to make sure that the order protected people. The inability to make sure that these switches got switched out by a car manufacturer who has Federal obligations, like new GM. New GM.

The other point I want to make, Your Honor, is a lot of discussion, a lot of effort to make sure that, from Your Honor's perspective, you characterize all of these people, I guess with the limited expectation of Mr. Weintraub, as here, waving the flag for economic loss Plaintiffs who don't deserve a lot of Your Honor's sympathy.

Your Honor, I think that that's a purposeful misdirection by new GM, because they're painfully aware of the types of Plaintiffs that are in the two consolidated complaints, and lest there be any confusion, I just want to make sure that Your Honor is clear to the extent that we weren't good enough in making ourselves clear in our pleadings, there, in essence, are three types of Plaintiffs. Plaintiff category number one are Plaintiffs who bought cars from new GM that were manufactured by new GM, and what I

think I've heard today, if not yesterday, was a concession by Mr. Steinberg that new GM does not seek to enforce the 2009 sale order against those Plaintiffs who bought cars from new GM that were manufactured by new GM.

He does hold out, of course, the contention that, to the extent that you bought a car from new GM, and it contained a part that was manufactured by old GM, "Huh huh, not so fast, we're not conceding anything on that score." Think about that from the construct of what Your Honor told us at the outset of the hearing. Old GM had an obligation to recall these cars, and if we're going to make believe that it told the world that at the sale hearing. So, new GM says, "I have no liability for selling a car with a defect that I know exists. I know it exists," because new GM is charged with the same knowledge, as a matter of Federal statutes, and cases that construe when a car manufacturer is deemed to know it has a safety defect, that's new GM is deemed to know.

But new GM, even though it's deemed to know that the ignition switch is a safety defect, sells a car with that safety defect and says, "Not my responsibility because it was engineered by DiGiorgio and all the old guys at old GM, and by contract, I don't have that liability. By contract, I don't have that liability.

So, notwithstanding the fact that your due process

rights were violated and that we kept this dangerous condition a secret, I contracted away my exposure for the ramifications of my violation of Federal law and, knowing that there was a due process violation, I'm going to contract away any exposure I might have as a consequence." That's not the way it works.

Category number two. Plaintiffs who bought cars manufactured by old GM after the sale hearing in July 2009. GM's argument suggests that GM doesn't know that there's a used car market. They sell a car to one owner and that's it. They have no way of knowing, nor should they be responsible for the fact that there's this weird thing that happens. People sell and buy used cars. From a due process perspective, it is crystal clear, that in July of 2009, there was no way for GM to give notice of the sale to anybody that was going to buy a car in the future, new or in the used car market.

That's Grumman Olsen, pure and simple. You can't give notice, from a due process perspective, to someone who doesn't have a pre-petition relationship. Why? They're not Creditors. Can you imagine someone who walks in -- you know, there's this new commercial I see on TV, where someone walks up to a guy who owns a car and says, "Be careful of that car. I'm the next owner. Don't get it dirty, don't let your dog jump in the car, because I'm the new -- I'll be

the new owner."

Can you imagine that person having come into Court in connection with the bar date and saying, "I'd like to file a claim because I'm thinking about buying a GM car, or I bought a GM car, used car, after the date of the filing of the petition." You bought a car after the date of the filing of the petition? As of the date of the filing of the petition, what was your Creditor status? "I don't know." Well, there was no Creditor status on behalf of Plaintiffs that didn't own GM cars pre-sale, pre-petition. No notice would have been possible to that class.

And then finally, the third class of Plaintiffs are the people who bought cars manufactured by old GM before the July 2009 sale hearing. And Your Honor, I must emphasize this. People in category three have claims asserted that do not rise and/or fall on the question of whether or not there is successor liability, as a matter of law. There are other theories, under which, even Plaintiffs in category number three can assert claims against new GM that once again, do not rely on successor liability theories.

All of the Plaintiffs in categories one, two or three, are asserting claims against new GM, direct liability, for its own knowledge, conduct and breach of affirmative duties that they had. They're not just

repacking successor liability-type claims.

Your Honor, I'm just going through my notes. I don't know that I really have much, if anything else, to argue, but I think what's amazing about this case is that we did have a three-month process, where in order to avoid discovery, the parties sat and went through a detailed stipulation of fact exercise. The Valukas Report, which is obviously part of the record, it's never been opposed, it was part of my affidavit, is in the record.

Those stipulations, that Valukas Report, the cases cited by Valukas beginning at page 279 of, I think it's one of the appendices, talks about - and it's almost as if Valukas was prescient about what the issues before the bankruptcy court were going to be - can you consider the victims of the ignition switch defect to be known Creditors as a matter of law? The answer is, yes, they're known Creditors as a matter of law, both product liability law, and specifically car manufactural law, and it's applicable in this case as a matter of due process.

If you've had a violation of due process, which, Your Honor, I suggest, is incontrovertible, the remaining questions are, do you require prejudice in order to remedy that violation? I think, Your Honor, we have laid out for you all sorts of prejudice. The problem I have is that it requires us to imagine what might have happened had we

gotten notice back in 2009, a difficult proposition which the case law suggests we're not supposed to embark on.

And Your Honor, what's the appropriate remedy? Your Honor, I think the appropriate remedy in a case where, because of the actions of old GM and new GM, which precluded any of these Plaintiffs from being able to attach their claims to the proceeds of the sale, because many of these Plaintiffs had no claim in a bankruptcy context, and therefore, any order that Your Honor entered that sold assets free and clear of claims, doesn't impact people who aren't Creditors at the time, and most significantly, because every Plaintiff in either of the two actions have asserted direct claims against new GM, this Court ought not enforce the 2009 order as to these specific Creditors.

In doing so, you won't prejudice 363 Sales. This is a unique, special, very different situation. It involves a car company, first and foremost. Not like we're going to have a lot more car company bankruptcies. And it involves a car company that purposefully failed to disclose a serious safety issue. Not a latent safety issue that may arise in the future. A current safety issue that was causing accidents and deaths and serious injuries, and GM knew it, and didn't tell anybody about it.

And then new GM, who picked up the tread database, picked up the PTRS reporting database, picked up all of the

internal information on customer complaints, picked up all the information regarding warranty claims. All of the information they were required by law to maintain, and still, through and including the bar date process, didn't disclose, and didn't disclose again for any number of years. Under those unique facts and circumstances, new GM is not entitled, as a matter of law or as a matter of equity, to enforce the 2009 order against our narrow class of Plaintiffs. Thank you, Judge.

THE COURT: All right, thank you. Mr. Weintraub?

MR. WEINTRAUB: Good morning, Your Honor. William Weintraub of Goodwin Procter for the pre-sale accident Plaintiffs. Speaking third, you always have the misfortune of having to rewrite and redo everything, so my presentation may be somewhat anecdotal, but I'm going to try to hit some of the things that I think Mr. Weisfelner did not hit and address the --

THE COURT: Disjointed is okay. Anecdotal isn't.

MR. WEINTRAUB: [LAUGHS] I'll just be disjointed today, Your Honor. I think, Your Honor, with respect to notice, you really cannot separate the sale notice that was given here from the seven-year non-disclosure of the ignition switch defect. Generic notice might have been sufficient in a case where knowledge of the existence of the ignition switch defect was widespread.

Generic notice may have been sufficient, had there been a prior recall, but without that widespread knowledge, but without that widespread knowledge, without that prior recall, that generic notice was not informative to the people that needed to be informed to come to Court to make their best arguments against the imposition of the successor liability shield.

And without going through much of what Mr. Weisfelner said about prejudice, I think the prejudice to the clients that my group represents is different, because we were injured pre-sale, but nonetheless, the prejudice that we suffered was that we would have challenged the equity, and all of this would have been in the context of disclosure of the contents of the Valukas Report. The Plaintiffs would have challenged the equity of the Buyer's request for protection in the context of the withheld information.

The Plaintiffs would have challenged the good faith of the Buyer and the Seller. The Plaintiffs would have questioned the absence of a prior recall, the absence of warning to unsuspecting drivers and most of all, as I said yesterday, Your Honor, the Plaintiffs would have questioned the actions of their own Federal government in trying to push through a sale in light of historical non-disclosure, faced with, now a new and disturbing factual

record. I think the dynamics would have been very different if that had been the case here.

With respect to what the notice should have been, Your Honor, we did address that yesterday but since it was re-argued again today, we think that content is what drives due process, and the generic notice here was imply insufficient, whether you were giving people notice by mail, or in some cases, we've done notice by postcard to save money, or notice by publication.

Without the recall, without the widespread knowledge of the existence of the ignition switch defect, what should have been disclosed were the conditions that were attendant to that ignition switch defect, which were unexpected stalling, loss of power brakes, loss of power steering, and disengagement of air bags in the event of a collision.

Now, Mr. Steinberg said, "Does that mean that we have to disclose hundreds of thousands of items that might have to be disclosed to people because they might have claims?" and I think the answer to that, Your Honor, is no. What you should have disclosed was this ignition switch defect because there was a seven-year history within GM of investigating this ignition switch defect. There was a wealth of information in tread in the PRST database within GM, so this should have been disclosed.

And, if there are any other types of defects that had not been disclosed for seven years under the same circumstances, those probably should have been disclosed, too. But what I'm here to talk about is the ignition switch defect, and that should have been disclosed,

Your Honor. One of the things that was mentioned by Mr. Steinberg was the Robie decision, and we actually discussed Robie in our brief in a footnote on page 18. And one of the things that we noted in Robie was that, when ruling against Mr. Robie, this Court made clear that the result might have been different had there been evidence that old GM had known of Mr. Robie's injuries and chose to use publication notice rather than a more effective method.

That's what our brief says, and then in the parenthetical, we have a quote from the transcript. "If GM knew back then that your client had already been injured, and chose to use the publication route rather than a way that would get to him more directly, that kind of factual circumstance would have troubled me."

And we think, Your Honor, that GM's knowledge of the ignition switch defect and the fact that every car, every car that had that ignition switch in it was defective, and entitled to repair, that put everybody in the category of being a known Creditor, not --

THE COURT: Are you suggesting that any of your

150 guys had been in accidents that old GM knew about?

MR. WEINTRAUB: I'm sure that people were in accidents that old GM knew about.

THE COURT: Your guys.

MR. WEINTRAUB: Yes.

THE COURT: And you're saying --

MR. WEINTRAUB: When I say -- that's kind of a -- not based upon actual knowledge, but the reason I say that I'm sure is because I think some of these lawsuits, like Powledge, was pre-bankruptcy, and we know that GM maintained a database, I forget what the acronym was for it, accidents --

THE COURT: Mr. -- that's kind of my point, Mr. Weintraub. I'm just trying to get my arms around the facts. I thought I heard Mr. Steinberg say that the Powledge family got actual notice.

MR. WEINTRAUB: Well, you know, the Powledge family is in a whole different bucket. The reason that the Powledge family is in a whole different bucket was, not only did the car have the defective ignition switch and not only did they have litigation with GM, what the contention is by the Powledge family, is that they were in discovery with GM and had issued discovery that should have, if GM was being truthful, given them the information about the ignition switch defect.

THE COURT: Well, this is the first I've heard in these two days about discovery violations. Discovery violations don't occur often, but when they do, they bug me like they bug a lot of people, but --

MR. WEINTRAUB: I didn't acknowledge --

THE COURT: I guess what you're arguing is, not just that you can unwind a settlement or do a lawsuit over by reason of the settlement agreement, but you can go after a different Defendant.

MR. WEINTRAUB: No, what I'm arguing -- I didn't raise Powledge. Mr. Weisfelner and Mr. Steinberg raised Powledge. Your Honor, ask me about Powledge. I happen to know about Powledge because I've been working with Powledge's lawyer. I also happen to know that Powledge -- it may not have reached Your Honor's desk yet, but I think about a week or two ago, they filed a motion in the Bankruptcy Court to vacate their settlement.

THE COURT: Well, somebody did. I don't remember the name of the litigant.

MR. WEINTRAUB: It's Powledge. So, you ask me about Powledge, and Powledge is not, I think, typical, but there may be other instances where people were in discovery with General Motors and did not get what they felt to be candid and appropriate responses, and in fact, one of the -- we submitted three stipulated facts that have not been

disputed, and one of the stipulated facts that we submitted was that the underlying circumstances of what GM said to people who had been injured and what those people have said back to GM have not yet been established.

THE COURT: Go on, please.

MR. WEINTRAUB: So, my point, with respect to Robie, Your Honor, was that we think that the ignition switch defect, and knowing that the car had needed repair, and that applies to everyone, not just people who had accidents, but people who have the economic damages claims, put them into the same bucket that you were concerned about with Mr. Robie. If GM knew something and didn't say something, that may change things.

What I'd like to do, Your Honor, is go back through some of the cases that were cited here, Your Honor, by Mr. Steinberg and just revisit them a bit. Chemtron was an interesting case because that was a bankruptcy of a company that, as I recall, stored radioactive waste, and there was a discharge in that case and years after the discharge, people came forward with radiation illness and said that our claim shouldn't be barred because we didn't have notice of the case.

And what the Court held in Chemtron was that it would have been too burdensome and impossible for the Debtor to find out who had lived near this radioactive site during

the relevant years, and in fact, people who said they had visited there were injured and the Court said it would be impossible for the Debtor to know who had been an overnight guest in somebody's house during those periods of time, so those people were not entitled to direct notice.

We think that, certainly my clients, who had accidents, and Mr. Weisfelner's clients who had a car with the ignition switch defect, do not fall into the category for the reasons Mr. Weisfelner stated, of Creditors that you didn't know the identity of and couldn't find. So Chemtron is a very different case from our case.

Mr. Steinberg also talked about New Century. In New Century, what the Court held was that, "we cannot find that a particular borrower had irregularities in their loan file, which would give rise to a Truth in Lending and other types of violations, just because there were generic assertions that, in general, this mortgage lender was lax, and that each loan file was different and had to stand of fall on its own facts, and therefore, this particular claimant didn't qualify for direct notice, because no one would have known she was a Creditor without reviewing her loan file, and that was not a requirement that the Court was willing to put on the Debtor.

Obviously, again, for the reasons Mr. Weisfelner said, this case is very different. This case was a known

defect baked into the DNA of every one of the affected vehicles. It was no difference between the ignition switch in my Cobalt from his Cobalt from her Cobalt, if it all had the same platform, it all had the same defect. And our contention is that General Motors knew about that.

Likewise, Your Honor, with respect to Enron, what Enron dealt with was an external investigation where the company, the Debtor, would have no way of knowing what the results or consequences of an external investigation by a Government lender might be. It might be absolved, it might not be absolved. So, the Court held that that wasn't enough to require notice.

Again, we think, because we have a known ignition switch defect across the board in all of the affected vehicles, it's a very different case. The burden, we think, Your Honor, was primarily not a due process case, and the only reason due process was discussed in the Burton case was because the Plaintiffs there, who were not future Creditors, tried to categorize themselves as future Creditors, but once you got past that very small discussion of Grumman Olsen, that case was basically a contract interpretation case, where the Court looked at whether or not these were assumed liabilities. You didn't have the due process violation in Chrysler and the seven years of non-disclosure that you have here.

DPWN. The premise of the District Court was that the Debtor had particular and peculiar knowledge that no one else had, and for that reason, the Debtor should have given notice to DHL. What the Second Circuit did, was it said, "We've looked at this complaint," because this was done on a motion to dismiss. "We've looked at this complaint, and we think there are some indications in this complaint that DHL may have known about this anyway," so what the Second Circuit did was send it back to the District Court to develop a factual record as to whether or not, notwithstanding what DHL has said in its complaint, it actually did know that there were antitrust and price fixing violations.

That's not the case here, because only GM knew about the ignition switch defect. The Folger case. The Folger case, I think, is a good case for us. That was the case where the Court held that the assets were not held free and clear of the supplier's defenses. And what the Court said was, the content of the notice of sale, the content of the notice of the sale, was insufficient to give notice to this party who was obligated on accounts receivable, that there was an effort to sell free and clear of its defenses.

The Cook case, or the Keck case, Your Honor, which is the Second Circuit case that follows Manville. Whether or not it's a summary order, what that case did was, it

expressly followed Manville, and what the Court stated at page 2 of the Lexus decision, is, “Bankruptcy Courts cannot extinguish interested parties who lack notice of, or did not participate in the proceedings.

See, for example, in re Johns Manville. (Holding the bankruptcy is no exception to the due process principle that one is not bound by a judgment in personam in litigation in which he is not designated as a party, or to which he has not been made a party by service of process.)” And that’s the important point, Your Honor, not that Keck had involved a 363 Sale. Keck relies on Manville, and Manville makes it very clear that there is no dispensation from due process just because you’re in a bankruptcy case. Due process is just as important as subject matter jurisdiction.

My favorite case of all, Your Honor. The Factors’ case, that’s the old Supreme Court case from the 1800s.

THE COURT: Which one?

MR. WEINTRAUB: Factors’.

THE COURT: Mm hmm.

MR. WEINTRAUB: That case is not a sale free and clear of liens, and I would urge the Court to read that case.

THE COURT: Do you have a cite for me to make it easier for me?

MR. WEINTRAUB: Yes. 111 U.S. 738.

THE COURT: Okay.

MR. WEINTRAUB: What happened in that case was, there was a bankruptcy sale. The bankruptcy sale was done subject to the liens of four lienholders who thought they were working in concert, and those four lienholders took title to the property in their respective names, collectively. And what they did was, they paid off the taxes, rehabilitated the property and wanted to sell it. One of the (indiscernible) four lienholders said, “Wait a minute. I wasn’t part of this. I wasn’t part of this group. Nobody told me about this,” even though there was evidence that this person was represented by an agent at the hearing.

What the State Court did, because I think it was started in State Court and then made it to Federal Court, they ruled that there was a merger -- well, what this recalcitrant lienholder argued was, “Not only was I not part of this group, but when this group took title, even though the liens were kept in place, the lesser title merged into the greater title. So now, their lien has been extinguished, they’re the owners. I wasn’t part of this and I didn’t get notice, therefore I’m the only surviving lien, jumping ahead of everybody.”

And what the Supreme Court said was, “Wait a

minute, that's not what seemed to have happened here. What seemed to have happened here is you're all working together, and if these guys didn't think you were working together, if they were wrong, we're not going to let you argue that there was a merge, which by the way there wasn't those liens are still good," so the Supreme Court determined that there wasn't a merger of the lesser title into the greater title, they said, "We're going to do a do-over, because either you're going to live by the agreement that we thought you made, or we're just going to do the whole sale over again, and you're going to get the exact same rights that you had before. So we're not going to let you, basically, turn on your partners and say that you were not part of this."

So it's a completely distinguishable case and it can't be subject to the proposition that sales free and clear of liens will be set aside or not set aside under certain circumstances because it never was a sale free and clear of liens.

Lastly, Your Honor, with respect to remedies, without belaboring the point, we think that Manville 4 controls, and we think that Manville 5 makes it clear that you're not invalidating or blue penciling the order. You're just applying the order as entered, only against those people who had appropriate notice.

What the Supreme Court said in Bailey, which was

the case that resulted in the coming back down, the Supreme Court said that the language of the agreement at issue here, which was basically an agreement that went back to 1986, and then Judge Lifland entered a clarifying order, I think, in 2004, where they tried to do whatever they were trying to do, I won't speculate, Your Honor. The Supreme Court said that that language in the agreement actually did cover direct claims, and it held that, in Bailey, that subject matter jurisdiction was res judicata, even though, without commenting on whether or not there was subject matter jurisdiction, the Court said it's too late to collaterally attack it, except those who were not given notice of the original order are not bound by it.

And when it went back down, the only issue back below was the effect of this ruling, this due process ruling, on whether or not Travelers still had to pay the, whatever it was, three or four hundred million dollars, which ultimately, the Second Circuit had said they had to pay. But we think that Manville 4 is the law of this Circuit, and we think that Keck recognizes that. Thank you, Your Honor.

THE COURT: All right, thank you. Okay, Ms. Rubin, come on up.

MS. RUBIN: I'm sorry, Your Honor, and I beg you to indulge me just for a few minutes. Mr. Weintraub

actually covered some of what I intended to cover, which was to talk about some of the cases that had been discussed by Mr. Steinberg this morning, and point out to Your Honor some of the factual distinctions that Mr. Weintraub so ably covered, particularly with respect to the Chemtron case, the Manville case and the DPWN case.

There are a couple of things that I wanted to clarify for Your Honor or answer for Your Honor if we could. The first is, you made a reference to the 150 people that Mr. Weintraub represented, and yesterday you questioned whether or not that was, in fact, the case, given the number that you recalled from the GUC Trust brief. I wanted to clarify --

THE COURT: I think you had said something like eight and he had said something like 150 --

MS. RUBIN: Yes.

THE COURT: -- and that had given rise to the confusion.

MS. RUBIN: Yes, and I wanted to clarify where the confusion arises. At the time that the GUC Trust submitted its brief, it based its count on the number of pre-sale -- I'm sorry, pre-closing accident victims who actually had pre-closing accidents based on schedules filed by new GM in connection with its motion to enforce.

At that time, meaning when new GM filed its motion

to enforce, in its original motion, it cabined the Edwards case that Mr. Weintraub spoke about with you yesterday and said, “At this point in time, we don’t consider that to be a pre-closing accident case. We reserve the right to come back to Your Honor and schedule that case.”

To the best of my knowledge, the Edwards case has never since been part of any of the subsequent schedules that have been filed. I certainly encourage Mr. Steinberg and Mr. Davidson to correct me if I’m wrong. By our counts, at this point in time, there are 31 cases, or rather 31 Plaintiffs that qualify as pre-closing accident victims, not including those in the Edwards case.

Again, that’s based on a count of the schedules filed by new GM, and just in terms of the motion to enforce that GM had originally filed, it talked about the Edwards case. There’s footnote 6 in that motion to enforce. That motion was filed, I believe, on August 1st of 2014. I, unfortunately, don’t have the docket number with me.

To turn to the other issues, Mr. Steinberg asked this morning, or he raised the point this morning, that there’s no situation in a prior 363 Sale in which a Chemtura-like notice has previously been approved. Well, Your Honor, I would pose a different question, or a different retort to that, which is, there’s no company that’s ever been accused of doing what old GM and new GM

collectively have been found to do here, which is, to withhold from the public, information justifying the recall of millions of vehicles.

With respect to the ignition switch defect alone, I think Mr. Weisfelner pointed out to you that there are 2.6 million vehicles encompassed in what new GM considers the ignition switch recall. There are additional 12 million, give or take, vehicles that have ignition switch-related defects. They were described in press releases in ways that are almost identical to the ignition switch defect as new GM considers it alone. So, with respect to the assertion that there's no case in the history of the Bankruptcy Courts that find Chemtura notices appropriate in a 363 Sale context, nor am I aware of any circumstance or situation that presents itself precisely like this.

That raises another point. Your Honor asked Mr. Weisfelner if the recall notices had been timely issued, would that have obviated the need for more disclosure in the notice? Mr. Weisfelner said that he thought it would have largely addressed it. I'll take a step further. If the recall notices had been timely issued here, yes, I believe that the publication notice here would have been appropriate, but barring that, that's not the situation we're in.

Barring that, yes, I believe the Chemtura notice

would have been appropriate here, because this situation, like Chemtura, and in fact, even like Chemtron, where the Debtor had been participating in clean up of the toxic site for 18 years, there was clearly contemplation that folks would have claims based on their exposure. They just couldn't find the people in those circumstances that might have claims because, as Mr. Weintraub pointed out, the people who were posing claims at that point were guests of those who owned the property in the vicinity.

This is even worse than that, Your Honor. If they in fact, knew enough to have issued a recall in 2008, no one has says to you, in that circumstance, had they in fact issued the recall, those folks would not have constituted known Creditors, even by the more stringent standards that Mr. Steinberg is asking you to adopt in terms of, reasonably ascertainable from books and records.

In terms of some of the cases that have been discussed, one case that didn't come back to Your Honor on this side is the Ex-Cel case, and Mr. Steinberg represented to you that that case was decided on different facts because the Purchaser there was found not to be a good faith purchaser.

Respectfully, Your Honor, I would disagree. There's a footnote in that case that indicates that while the good faith of the Purchaser was, as Ninth Circuit

Bankruptcy Appellate Panel said, in doubt, they then go on to say the following, Your Honor, and I quote, “We therefore respectfully disagree with Edwards, to the extent that it allows considerations such as,” and it provides a list, and one of them is as follows: “The innocence or good faith of third parties involved in bankruptcy sales.” In other words, the Ex-Cel case is saying, whether or not someone is a good faith Purchaser, we disagree with Edwards to the extent that it allows considerations like the good faith of that Purchaser, and I’ll further quote, “to justify departures from due process standards in adjudicating property rights.”

Your Honor, Mr. Steinberg, I think, also referenced Judge Gonzalez’s decision in the Chrysler case with respect to future claimants, and I know that there’s been a lot of discussion about whether the used car purchasers here constitute future claimants. I certainly was one who made an argument to Your Honor yesterday that they do. Without revisiting that argument, I will just say that, as Your Honor is well aware, when the Second Circuit issued its decision in the Chrysler matter at the time that Your Honor entered his sale decision, oral argument had already been held, Your Honor was well aware of the arguments that had been made.

The sale decision reflects Your Honor’s

understanding of what that decision would have reflected. But the decision in the Chrysler matter was not issued until after Your Honor issued the sale decision, and in that decision --

THE COURT: No, the written decision in Chrysler wasn't issued until after I issued my decision, but the oral decision of the Second Circuit in Chrysler, which was confirmed by a written order at the time, had held that Judge Gonzalez's decision was affirmed for substantially the reasons set forth by the Bankruptcy Court, and if your point is that a decision of I don't know how many pages of the Second Circuit self-destructs because after the fact, the Supreme Court on the appeal by those Indiana bond holders had directed that the judgment be reversed as moot, it's more difficult to see how it was moot at the time that the Circuit issued the first of its orders.

MS. RUBIN: That actually wasn't my point, Your Honor, and I don't disagree with the factual predicate that you just laid forth, and I apologize for suggesting otherwise.

My only point was to suggest, when the Second Circuit did issue its written opinion, at the end of that opinion, it said that it was going to affirm Judge Gonzalez in so far as approving the 363 order free and clear of future claims was consistent with the bankruptcy code, but

as Your Honor knows, it caveated and left for a future day, whether or not the disposal of those claims was in fact constitutional and said that, when and if the case came before it that raised post-sale claims that could not have been anticipated and were properly qualified as future claims, it would revisit that issue. That's all I meant to suggest to Your Honor.

Let me return, if I can, Your Honor, to the sale agreement itself. So, Mr. Steinberg referenced the sale agreement this morning and said that I may have mischaracterized the language in 2.3(b), which pertains to retained liabilities, saying that I didn't read to Your Honor the rest of that provision. Respectfully, even if I had read the remainder of the provision, it doesn't change the fact that the definition of retained liabilities in this sale agreement still pertains to the liability of any Seller, and all of the liability as it's defined there, is still referential to the liability of any Seller. You can't escape that phrase, so whether it arises or accrues before or after the closing, the definition or retained liabilities still goes back to, and is inseparable from, the liability of any Seller.

Now, to the extent that the sale order goes beyond that in paragraph 46, I'll also point Your Honor, as Mr. Steinberg did, to paragraph 17 of the sale order, which

pertains to the recall-related obligations that new GM took upon itself, saying from and after the closing, and I'll -- I'm reading from the sale order, "the Purchaser shall comply with the certification, reporting and recall requirements of the National Traffic and Motor Vehicle Safety Act, as amended and recodified." And it goes on to --

THE COURT: Yeah, can you reference by number, because that's (indiscernible).

MS. RUBIN: Sure, it's paragraph 17 of the sale order, Your Honor.

THE COURT: Okay, and I think --

MS. RUBIN: And --

THE COURT: Pause for a second. I think that's the same one that Mr. Steinberg made reference to before.

MS. RUBIN: It is. It's no different than the provision that Mr. Steinberg was referencing. My only point, Your Honor, is Mr. Steinberg has framed for you a universe, as you know, where everything in the sale agreement is either a retained or assumed liability, and there can be no other liability for new GM whatsoever, in respect of vehicles manufactured by old GM.

To the extent that paragraph 46 purports to provide him with that protection, I'll revert back to what Mr. Weisfelner and Mr. Weintraub ably said, which is, to the extent that Your Honor is going to consider prejudice to be

an essential component of the test for due process here, that is the prejudice to them.

Had they been aware of the recall-worthy safety defects, either through a recall notice, or through a modification of the publication notice that was provided here, or even a notice that had been sent to each of their clients' homes, there's no doubt in my mind that they would have come to this Court and complained about the language in paragraph 46. They would have complained about the purchase price. They would have complained about the upward adjustment provision, as Mr. Weisfelner points out, because where we are now in terms of allowed, general unsecured claims, we're at about the $32 billion dollar mark, and the upwards adjustment, as Mr. Weisfelner pointed out to you correctly, doesn't kick in until the $35 billion dollar mark.

That means we've got $3.2 billion dollars, not just in claims, in allowed, general unsecured claims to go before the GUC Trust is entitled to any of the adjustment of the purchase price in terms of securities. And at that point, what comes back to the GUC Trust, it's not shares and warrants, Your Honor. It's just shares.

Now, paragraph AA of the sale order was also referenced by Mr. Steinberg, and I don't read paragraph AA to say what he does. I read paragraph AA to talk about

Successor and Transferee liability, and not, more broadly, to suggest that new GM can never be culpable for its own actions in respect of the subject vehicles that we're talking about here, and again, Your Honor, I'll read to you partially, not because I'm trying to be obfuscatory, but only for the matter of time.

It says, "the transfer of the purchase assets to the Purchaser will be a legal, valid and effective transfer of the purchased assets, and except for the assumed liabilities, will vest the Purchaser with all right, title and interest of the Sellers to the purchased assets, free and clear of liens, claims, encumbrances and other interests," and then again, going down a couple of lines to just take out some of the additional language, "based on any Successor or Transferee liability," and then goes on to say, "including, but not limited to," to define what Successor or Transferee liability mean, again, I don't take that paragraph to suggest that new GM could not be liable to folks in the Plaintiffs' position, for actions of their own making.

THE COURT: Their own making, being new GM's own making, is contrasted to old GM's making.

MS. RUBIN: Yes, that's correct, Your Honor. New GM's own making. And Your Honor mentioned yesterday that he thought that the argument that any of Plaintiffs' claims

fell into the definition of assumed liabilities was not a particularly good one, so I won't waste your time with that, except to say this, Your Honor.

The definition of assumed liabilities includes at Section 2.3(a) 11 of the sale agreement the following. "All liabilities arising out of, relating to, in respect of, or in connection with, the use, ownership or sale of the purchased assets after the sale," and then Your Honor, in a separate provision of the sale order, in the definition of purchased assets, there is a portion of the definition --

THE COURT: But you've made that argument in your brief.

MS. RUBIN: I did.

THE COURT: Are you saying that that trumps prohibitions against successor liability?

MS. RUBIN: No, what I'm saying, Your Honor, is, to the extent that Mr. Steinberg has submitted to you that his client is only liable for assumed liabilities, the express definition of assumed liabilities within the sale agreement encompasses his client's own use of purchased assets, meaning old GM's books, records, legal records, databases, including some of the same databases that Mr. Weisfelner has amply referred to in his argument earlier this morning.

That's not a successor liability argument, Your

Honor. That's talking about when new GM assumed the assets that they purchased on day one, they would be liable from that point forward as an assumed liability, their use of those purchased assets, including all of the books and records that they held on to. In fact, Your Honor, in mediating claims with those who made claims against the Estate, to the extent that Motors Liquidation Company and subsequently, the Trust, needed information about particular accidents or litigation that had commenced before, where did they go for that information? They went to new GM.

For example, in the Phillips case that Mr. Weintraub was referring to earlier, when MLC was mediating that case, when they needed more information about, "What is this case about? What are her claims? Is there any merit to them?" Where did they go for that information? They went to their liaison in the new GM in-house legal department.

So, to say that new GM has no liability predicated on their use of the purchased assets, including books, records, legal records, databases, I think is a fairly specious argument. Recognizing that Your Honor has already indicated that that's not an argument he's necessarily pre-disposed to.

The final thing I'll say is, I think my colleagues over here have talked at great length about prejudice and

the points of 363 hearings. I'll just say this. There's not a single case that new GM can cite to you that stands for the proposition that due process works by proxy. So, while they have cited to you --

THE COURT: Works by proxy?

MS. RUBIN: Works by proxy, in other words, the fact that I get due process doesn't mean that Mr. Weisfelner gets due process, doesn't mean Mr. Steele gets due process, Mr. Esserman gets due process. We all may be similarly situated in some way, but that's not the way the law stands. That's not what our Constitution mandates or entails. So, Mr. Steinberg can say a bunch of similarly situated people did in fact get notice, they showed up at the sale hearing and made some arguments, I think Mr. Weisfelner has amply refuted that the arguments being made were, in fact, the arguments he would have made, had he been given adequate notice.

But putting that aside, there's no case that I'm aware of that stands for the proposition that giving due process to someone like you necessarily fulfills a company's due process obligations in the course of a bankruptcy or in any other proceeding, for that matter.

The final thing that I would say is, Your Honor obviously has indicated that precedent is very important to him, and the concern about what would happen here if he

finds that the appropriate remedy for a due process violation is to find that Mr. Weisfelner and Mr. Weintraub and Mr. Esserman's clients are necessarily exempt from the 363 Sale order and injunction entered here. But let me pose a different question.

If there is no remedy here for the clear due process violation, and I'll submit that if Your Honor is willing to find that new GM knew enough that it should have triggered a recall, that there is a due process violation here. If there's no remedy here for a clear due process violation, maybe that gives prospective 363 Purchasers some minimal additional comfort, but what else is it going to signal? That companies are entitled to saddle Creditors with the knowing misconduct not just of the Debtor, but of the Purchaser? I don't know that that necessarily is justice either, Your Honor, and with that, I'll rest. Thank you, Your Honor.

THE COURT: All right.

MR. STEINBERG: I have just 90 seconds, Your Honor.

THE COURT: [LAUGHS]

MR. STEINBERG: You can hold me to the 90 seconds. I'll stop at that point.

THE COURT: Go ahead.

MR. STEINBERG: Mr. Weisfelner said that he was

only aware of two manufacture -- car manufacturing cases. I just point out White Motors, another car manufacturing case, 75 B.R. 944. It was the case that I cited to before, which talks about successor liability being Federally pre-empted. Mr. Weintraub and I actually agree that the Edwards case is part of the motion to enforce. When I refer to paragraph AA of the sale order, I was talking about old GM conduct, not new GM conduct, and I don't really know what Mr. Weintraub was talking about as three stipulated, non-disputed facts that we agreed to, because I don't think we agreed to anything. But I rest with that.

THE COURT: All right.

MR. WEINTRAUB: I need to respond to that, Your Honor.

THE COURT: Go ahead.

MR. WEINTRAUB: When Mr. Steinberg says he doesn't know what those facts are, they were sent to him. They were sent to him and it said, "You can object to them, not object to them, agree or disagree." There was never a response. I filed them with the Court, they were served on him, they were part of the record in the case. They have never been disputed.

MR. STEINBERG: Oh, but they have. I'll show you the 11.

MR. WEINTRAUB: You have disputed them?

THE COURT: All right. Folks, this isn't the English Parliament. Speak to me. All right, am I correct that we can still finish with this in about 40 minutes?

MR. STEINBERG: This is correct, Your Honor.

THE COURT: Ms. Newman? Was that a yes?

MS. NEWMAN: I think so, Your Honor.

THE COURT: All right. A ten-minute recess, and then we're going to go take mootness next. We're in recess.

[PAUSE RECORDING]

[RESUME RECORDING]

THE CLERK: All rise.

THE COURT: Have seats, please. Ms. Newman, you're leading off.

MS. NEWMAN: Yes, Your Honor. Good afternoon, Your Honor. For the record, I'm Deborah Newman from Akin Gump on behalf of the participating unit holders, and I will be addressing the equitable mootness threshold issue on behalf of both the participating unit holders and the GUC Trust administrator.

Your Honor, as I'm sure you are well aware, the law of equitable mootness is well-settled in the Second Circuit and was recently re-affirmed by the Second Circuit in its BGI decision, the cite of which is 772 F3D 102. A claim that would require a material modification of a substantially consummated plan of liquidation is presumed to

be equitable moot, unless the claimant can satisfy all of the factors established in the Second Circuit Chateaugay decision that have been held to apply to liquidations. Of course, there is no dispute here that the plan has been substantially consummated.

In allowing Plaintiffs to assert their claims against the GUC Trust now, claims that they allege to be in the multiple billions of dollars, would require a material modification of the substantially consummated plan. The plan cleanly provides that GUC Trust beneficiaries consist only of Creditors that have held allowed or disputed claims as of the effective date, the Defendants in the currently pending JP Morgan action, and the holders of the publicly traded GUC Trust units.

Expanding these beneficiaries now to include Plaintiffs and their multiple billions of dollars of claims would require that the plan be materially modified.

Now, turning to the showing the Plaintiffs must overcome to defeat the presumption that their claims are equitable moot as against the GUC Trust, those factors require Plaintiffs to show one, that they acted diligently in pursuing claims against the GUC Trust; two, that they provided notice of their potential claims against the GUC Trust and these proceedings to all parties who could be affected by their claims if allowed against the GUC Trust;

three, that the Court can fashion relief for Plaintiffs, and can do so without inequitably impacting the rights of third parties; and four, that providing such relief will not unravel intricate transactions so as to knock the props out from under them, and create an unmanageable and uncontrollable situation for the Court.

Your Honor, Plaintiffs cannot satisfy any of these factors.

THE COURT: Were you directing those from Chateaugay or from something else?

MS. NEWMAN: I'm sorry, Your Honor, I didn't hear you.

THE COURT: Were you paraphrasing Chateaugay or?

MS. NEWMAN: Yes, Your Honor. I was paraphrasing Chateaugay as it subsequently then applied in the context of plans of liquidation which omit one of the Chateaugay factors, which is the factor that requires a showing that awarding the relief will not affect the reorganized Debtor from emerging as a revitalized entity.

THE COURT: Mm hmm.

MS. NEWMAN: And you can find those factors as applied towards a liquidation in the BGI decision, recently -- the recent Second Circuit BGI decision.

THE COURT: Okay.

MS. NEWMAN: Most glaring, Your Honor, of these

factors and the failure -- the Plaintiffs' failure to meet them, is the point that Your Honor alluded to yesterday, which is that Plaintiffs have taken no actions whatsoever to pursue claims against the GUC Trust or to stay GUC Trust distributions. Quite the contrary, Plaintiffs have taken pains to point out that they were not pursuing claims against the GUC Trust. Now, under binding Second Circuit case law, this factor alone mandates a ruling that equitable mootness would bar any of the Plaintiffs' claims against the GUC Trust.

Plaintiffs argue in their opposition brief that this Chateaugay factor should not apply to them, given their argument that their procedural due process rights were violated, because they were given insufficient notice of the bar date and the confirmation order. But Your Honor, in BGI, the appellants were similarly arguing that Judge Glenn's decision denying their motion to file late claims should be reversed because they were provided insufficient notice of the bar date, in violation of their due process rights.

And the Second Circuit affirmed the District Court's ruling that those appellants' claims were equitably moot, because, notwithstanding the claims of insufficient notice and procedural due process violations, because the appellants had failed to seek a stay of a liquidating

Trust's distributions after becoming aware of their claims or alleged claims, and because the appellants there had failed to provide notice to general, unsecured Creditors, who would be stripped of their recoveries if the relief that appellants had sought, had been granted.

Here, Plaintiffs' argument that their procedural due process claims should relive them of having to comply with Chateaugay's diligence factor rings especially hollow, given that Plaintiffs chose for strategic reasons, not to pursue claims against the GUC Trust and not to seek to stay the GUC Trust's distributions even after they became aware of their alleged claims, and there's no dispute about that, Your Honor.

Under binding Second Circuit case law, the ramification of that strategic decision is that any claims the Plaintiffs may seek to pursue against the GUC Trust now or in the future, are barred by the doctrine of equitable mootness. And this is the case, Your Honor, even if the Court accepts Mr. Weisfelner's somewhat half-hearted argument that the reason that Plaintiffs chose not to seek a stay was because they believed that they would not have been able to obtain one under the law. Even if that is so, Your Honor, the case law is clear that what is important to satisfy in Chateaugay's diligence factor is that a claimant seek a stay, not that it obtain one.

And the Second Circuit stated, Your Honor, in Chateaugay, for example, that a party who fails to seek a stay, quote, "does so at his own risk." In the Metro Media decision, the Second Circuit said, "A chief consideration under Chateaugay 2 is whether the appellant sought a stay of confirmation." The Court went on to say, "We insist that a party seek a stay, even if it may seem highly unlikely that the Bankruptcy Court will issue one."

And in the Campbell case, Your Honor, Judge Buchwald said, it's footnote 30, "We emphasize that the Second Circuit has made it clear that an appellant is obligated to protect its litigation position by seeking a stay, even where a stay may be unlikely to be granted." Judge Buchwald went on to say, "At oral argument, it became clear that appellant's counsel deliberately chose not to seek a stay because he was confident that the appeal would not be equitably mooted. This was an audacious litigation strategy. Nonetheless, having chosen not to seek the stay, appellants are now faced with the consequences of that choice."

A known litigation risk did not give appellants license to flout well-settled procedural rules. Accepting appellants' arguments to the contrary would both frustrate the policy of the equitable mootness doctrine, and undermine the doctrine itself. All of these cases mandate that the

ramification of Plaintiffs' decision not to seek a stay of Trust distributions, or to assert claims against the GUC Trust, is that Plaintiffs' claims are equitable moot.

Turning to the notice factor under the Chateaugay decision, Your Honor, Plaintiffs have also failed to satisfy this factor. They have not provided any notice to GUC Trust beneficiaries whose remaining recoveries could be completely eviscerated if Plaintiffs are permitted to pursue claims against the GUC Trust. Plaintiffs argue, in their opposition papers, that they satisfied this factor because the GUC Trust administrator and the participating unit holders have notice of these proceedings, and the GUC Trust provided notice of the motions to enforce and the threshold issues in its public disclosures beginning in May 2014.

But this falls far short of the notice required by Chateaugay, which necessitates actual notice to all parties that could be adversely affected by Plaintiffs claims, as Judge Marrero stated in Calpine, Your Honor, an assertion that potentially affected parties may have had constructive or actual notice is not sufficient to satisfy the burden of establishing that such parties had notice, and that's at 390 B.R. 508, the pinpoint cite is 522.

Here, Your Honor, the potentially affected parties, the parties who could be significantly adversely affected if Plaintiffs are permitted to pursue the GUC

Trust's assets, go far beyond the GUC Trust administrator and the participating unit holders that we represent, and they include all GUC Trust unit holders and the holders of disputed claims and allowed claims that have not yet received distributions. There is no evidence in the record that all of these parties were provided with actual notice.

Now, Your Honor, turning to the next two Chateaugay factors that apply here, Plaintiffs and new GM also both spend a significant amount of time in their briefs arguing that relief can be fashioned for Plaintiffs from GUC Trust's assets without harming innocent third parties, or knocking the props out from under the plan. This just is not the case, Your Honor.

First, as Ms. Rubin has touched upon both yesterday and today, as things currently stand, there are no assets in the GUC Trust that could be awarded to the Plaintiffs. All of the GUC Trust's assets have been allocated to fund recoveries to the Defendants in the JPM litigation in the event that they are required to disgorge the distributions that they received in connection with the bankruptcy, disputed claims that have not yet been resolved, allowed claims that have not yet received distributions, and GUC Trust administrative costs and taxes.

And even Plaintiffs appear to concede that the GUC Trust assets cannot be diverted from these allocations to

the --

THE COURT: All right, pause just for a minute. I let you go on for a long time --

MS. NEWMAN: Sure.

THE COURT: -- without interrupting, but you haven't hit yet on the things that are of the most concern to me.

MS. NEWMAN: Okay.

THE COURT: You're relying on the failure to provide notice to the GUC Trust beneficiaries, but I've heard for about a day and a half about another kind of failure to provide notice, and in substance, you're saying that the failure to give your guys notice trumps the failure to give Mr. Weisfelner's guys and Mr. Weintraub's guys their notice. I haven't heard anybody else speak yet, but somehow I suspect that one or another of them is going to say that, because they weren't given notice of the provision in the confirmation order that you are talking about, that's not any more binding on them than the sale order is, and my task, obviously confined by the limits of law, is to do what's fair and right.

Now, I haven't heard you mention yet, if you ever will, 502(j), but that kind of contemplates a situation where you have late arrivers at the party, or different claims, and seems to set out a roadmap for what's equitable,

which is that you don't give people who already got distributions and claims, you don't make them give any money back, but to the extent you haven't given out any more, you do a stop, look and listen to make sure that those who may have been prejudiced before, catch up.

Also, it's my impression, I haven't gotten a mandate yet, but the Circuit didn't like my decision on JP Morgan Chase, and presumably, if things materialize now, I know there are issues on who owns the cause of action, which I ruled on, but which a District Judge says was not ripe. Arguably, it's riper now, but that would bring in a pot of money beyond what you have now, which presumably will be distributed to the unsecured Creditor community, unless something else happens.

MS. NEWMAN: Okay.

THE COURT: Can you address what's really bugging -- I mean, a tactical choice --

MS. NEWMAN: Sure. Sure, sure.

THE COURT: -- that's the low hanging fruit, okay?

MS. NEWMAN: Yes.

THE COURT: Okay? Let's talk about the harder stuff.

MS. NEWMAN: Sure, Your Honor, I'd be happy to do that, and I'm going to start in the reverse order of the way in which you posed the questions and begin with the JPM

question. I think Your Honor --

THE COURT: Forgive me. You haven't appeared before me as much as many people. I hate acronyms. JP Morgan?

MS. NEWMAN: Yes, Your Honor, JP Morgan.

THE COURT: JPM is JP Morgan Chase?

MS. NEWMAN: Yes, Your Honor, I will keep that in mind.

THE COURT: Okay.

MS. NEWMAN: And I apologize to the Court. I will begin by addressing Your Honor's question with respect to the JP Morgan litigation, and I think, Your Honor, I understand the status of the JP Morgan litigation to actually be the reverse of what you just articulated. Given the recent rulings in the JP Morgan litigation, my understanding is that JP Morgan will, at least the way things stand and as I acknowledge as you did, that there is a lot more that will likely transpire in that case, but there is a cha -- given the reversal of Your Honor's decision, JP Morgan may be required to disgorge the distributions that it was provided with in the bankruptcy, and if that is the case, then JP Morgan, then, will have a resulting claims against the GUC Trust.

THE COURT: An unsecured claim.

MS. NEWMAN: An unsecured claim, and so, of the

approximately $700 million dollars worth of assets in shares and warrants that are currently in the Trust, I think approximately, between $400 and $500 million dollars would then have to be paid out to the Defendants in the JP Morgan litigation. So, where things currently stand I think has actually been a negative development, from the GUC Trust's perspective, because it is more likely now that the assets in the GUC Trust that have been reserved for the JP Morgan litigation will now have to be distributed.

THE COURT: Forgive me, that sounds upside down to me.

MS. NEWMAN: Okay.

THE COURT: I thought the whole idea of the JP Morgan / Trust litigation was to make JP Morgan Chase give back the amounts that it got as a secured Creditor.

MS. NEWMAN: That's correct.

THE COURT: And it has to pay back in (indiscernible) dollars, money that you're now going to give out in (indiscernible) bankruptcy dollars.

MS. NEWMAN: So, that's correct with one exception, which is that the money that will be paid by the JP Morgan liti -- Defendants goes not to the GUC Trust but to a separate avoidance action Trust, and the beneficiaries of the avoidance action Trust, and I -- if I say something that's incorrect, I assume that someone from the GUC Trust

will correct me because they're more familiar with these facts, but I think that what happened was that avoidance action Trust interests were distributed to certain general unsecured Creditors.

I'm not sure that the whole general unsecured Creditor community received those Trust interests, but the entire GUC Trust -- excuse me, the entire unsecured community received interests in the GUC Trust and here is Mr. Martorana, who may correct something that I said.

The bottom line, just before Mr. Martorana comes in and cleans up what I just probably fumbled, is that the money that's being paid by the defense in the JP Morgan litigation in the event that they are ultimately required to disgorge, goes to a Trust that is not the GUC Trust, that is different from the GUC Trust, and it does not share an identity of beneficiaries with the GUC Trust.

THE COURT: Go on.

MS. NEWMAN: And if I --

MR. MARTORANA: Sorry. To be clear, Your Honor, again, Keith Martorana, Gibson, Dunn & Crutcher, on behalf of the GUC Trust. Just to clarify how things work between those two different Trusts, the plan provided for two different Trusts to be set up, the GUC Trust, an the avoidance action Trust. Both had, potentially, the same beneficiaries at the outset, which was general unsecured

Creditors for the GUC Trust and for the avoidance action Trust. It was either the DIP lenders or the general unsecured Creditors, and that has not been decided yet, as you well know and as you've noted.

But what happened subsequently was that the GUC Trust -- the beneficiaries of the GUC Trust were given units that became transferrable. So you end up with a situation where you've got one Trust, which is the avoidance action Trust, which may recover on the JP Morgan action. If that happens, cash comes into that Trust, the beneficiaries of that Trust will be either Treasury, who may benefit from the cash, or it will be the original general unsecured Creditors, which include bond holders and trade claims and employee claims, and then you've got a completely different set of beneficiaries of the GUC Trust.

Potentially, now, you have people that were either original holders of claims or people that have sold their units into the market and the unit holders, who bought them in the secondary market, are now the beneficiaries of the GUC Trust.

So, you could have a situation where cash is collected by the avoidance action Trust, but does not actually go out to general unsecured Creditors. So, just to clarify.

THE COURT: All right, thank you.

MS. NEWMAN: Yes, and just to add to that, I think it's clear that you certainly will have -- there will be GUC Trust unit holders who will not benefit, who have bought their units in the aftermarket and will not benefit at all from what happens with the JP Morgan litigation and the avoidance action Trust, because they didn't receive interests in the avoidance action Trust.

THE COURT: Mm hmm.

MS. NEWMAN: So, turning next to the first question that Your Honor posed, reconciling the notice requirements and the alleged lack of notice here, and Section 502(j) of the Bankruptcy Code. To begin with, it's not clear to me that Section 502(j) applies here --

THE COURT: Well, it plainly doesn't apply by its terms.

MS. NEWMAN: Okay.

THE COURT: The question is, doesn't that establish kind of a Congressional intent for what's just --

MS. NEWMAN: Mm hmm.

THE COURT: -- when you have latecomers to a liquidating situation.

MS. NEWMAN: So I think you have to go back to the Second Circuit's ruling in BGI where they said, "Look, we acknowledge that these claimants are saying they never received notice of the bar date, but even after they'd

realized what was happening, they didn't show up. They didn't seek to stay Trust distributions." And in that -- in those circumstances, their claims are equitably moot, and I think this --

THE COURT: Forgive me, and you're saying that applies not just to the incremental distribution that was made in late 2014, but the whole salami?

MS. NEWMAN: I think it -- I think that when you are balancing the equities between unit holders and other GUC Trust beneficiaries, who have an expectation of what the finite amount of liabilities of the GUC Trust is, and with respect to unit holders, went out into the market and purchased units in reliance on that finite amount of potential claims.

When you are trying to reconcile the potential prejudice of that universe of parties with the potential prejudice to Plaintiffs by not being able -- by precluding them from pursuing the GUC Trust, you have to take into account, and the Second Circuit says you have to take into account, what have the Plaintiffs done to protect themselves against the prejudice? And here, they've done nothing, and the Second Circuit says quite clearly, Your Honor, they have to try to stay distributions. They have to, even if they think there's no chance they're ever going to be able to do it, they have to go the Court and try.

And, they have to put GUC Trust beneficiaries on notice that they may come in and wipe out any remaining distributions that those GUC Trust beneficiaries are expecting. They have to do that, and there's a reason for that requirement, because GUC Trust units have continued to trade, since February of 2014, no doubt. And the people who continue to purchase those GUC Trust units, they were entitled, under Second Circuit law to be told, "Hey, you may not want to buy that unit because you may not be get -- there may be no more distributions, and while you think, you know, you can conduct an assessment of what the potential claims against the GUC Trust may be, there may be multiple billions of dollars of claims that will be piled upon what you think is the finite amount of liabilities."

THE COURT: I'm with you. Keep going.

MS. NEWMAN: Okay, so Your Honor, I think where I left my outline was talking about the Plaintiffs' argument, and this argument was made by new GM as well, that the Court can fashion relief out of the GUC Trust's assets without harming innocents, GUC Trust's beneficiaries and without knocking the props out from under the plan. And I touched upon this a little bit in responding to Your Honor's questions.

There are, as I said before I started to respond to Your Honor's questions, there are no assets in there

right now that could be -- they're -- all of the assets are reserved for the known GUC Trust liabilities, and to the extent that those known GUC Trust liabilities turn out to be less than is currently estimated, for reasons of fairness, what I just went over, equity, the plan, the confirmation order, all demand that the unit holders receive those assets.

THE COURT: Slice and dice that, please, Ms. Newman.

MS. NEWMAN: Sure.

THE COURT: Because you make a very strong argument for the equity of not tapping funds that have been reserved for people whose claims haven't been totally filed, but haven't been either allowed or disallowed, so they shouldn't be prejudiced.

MS. NEWMAN: Mm hmm.

THE COURT: But it's at least possible, especially given your luck, not luck, skill, in reducing claims from the initial enormous amount they were to the much lesser amount, that you may be equally successful now, and that you're going to have extra stuff at the end.

MS. NEWMAN: Mm hmm.

THE COURT: You're arguing, in a sense, that that should become a windfall to those who arrived at the party first, rather than those who, it might turn out, have

equally valid claims.

MS. NEWMAN: Oh, Your Honor, I don't think that's a windfall. The GUC Trust units, as Mr. Martorana said, have been trading. They are freely tradable. I think the number is approximately 100 million worth of GUC Trust units have traded since the date when they became freely tradable through November of 2014, and I'm sure today that number is larger, and -- excuse me, that's 100 million in number. It's $2.1 million in value, and I don't think there can be any question that the people who purchased those GUC Trust units, did so based on the GUC Trust disclosures of what the maximum amount of claims against the GUC Trust could possibly be.

And so, it's not a windfall. For them, had they made a decision, which I believe they most likely did, no one would purchase the GUC Trust units saying, "Well, I'm going to make an assessment that there are not going to be any more distributions made from the GUC Trust," certainly they purchased those units based on their estimation, given what was known at the time, that there would be additional distributions, and to take those distributions away now, I don't think would be a windfall.

I think it would be highly prejudicial to the unit holders, and I think that's entirely consistent, Your Honor, with the statements that you made in addressing the

equitable mootness argument, although it was not decided, in the Morgenstein case.

People are entitled to rely on what is known under the plan about what the total maximum amount of liabilities for the GUC Trust could be when they purchased their GUC Trust units, and that is especially the case here, when Plaintiffs have done nothing to apprise them of the risk that those liabilities could be increased by multiple billions of dollars, as Plaintiffs say.

I wanted to talk briefly, Your Honor, about the accordion feature under the sale agreement, because that was raised in Plaintiffs' briefing that, perhaps the accordion feature could solve this question and that the funds that new GM may be required to pay under the accordion feature could be used to fund Plaintiffs' claims against the GUC Trust. As Ms. Rubin stated this morning, the accordion feature, or the requirement for new GM to pay additional funds under the sale agreement does not kick in unless allowed claims reach $35 billion dollars.

Right now, they're at approximately $32 billion dollars, so getting -- we hope that that won't -- that the allowed claims will never go up to the $35 billion and that this will be resolved today or shortly after today, but getting from the $32 billion to the $35 billion, with respect to Plaintiffs' claims should that happen, would

clearly require the GUC Trust to expend a significant amount of both time and money, and it's unclear how much money is -- how much the value of the securities left in the GUC Trust is available to fund, really, anything, given the reserves that have already been established.

So, I don't think it's realistic that the funds that would come in -- could potentially come in under the accordion feature in the sale agreement could be used to fund Plaintiffs' claims. Certainly, that could not be done without prejudicing existing GUC Trust beneficiaries.

Additionally, I will just note that the amount that's required under that accordion feature is a maximum of, I think, approximately a billion dollars based on today's share prices of new GM common stock, and it's something like $160 million for every billion dollars in allowed claims over $35 billion, so it's really a small fraction of what the Plaintiffs' allowed claims would be, because remember we'd have to have at least $3 billion to get up to the $35 billion dollar threshold, and then another billion to get that $160 million that would be required under the sale agreement. It really would be a very small fraction of Plaintiffs' claims.

Plaintiffs also made an argument that perhaps their claims could be funded by dividends that the GUC Trust received from new GM. I think that's also very unrealistic.

To date, new GM has ---

THE COURT: That's dividends on what's, in substance, a kind of like Treasury stock? In other words, dividends you get on the shares you're holding in reserve?

MS. NEWMAN: Correct, dividends paid on the shares that are owned by the GUC Trust, Your Honor. To date, the GUC Trust has received $14 million, a little bit less than $14 million dollars in dividends, and approximately $4 million dollars of that has been distributed. That's clearly going to be a drop in the bucket for what Plaintiffs are alleging are going to -- the amount of the claims the Plaintiffs are alleging or asserting.

Your Honor, I can speak to the ripeness issue, if it's something that your Court -- that Your Honor would like me to --

THE COURT: You mean the Colleen McMahon ripeness issue?

MS. NEWMAN: Well, there was an argument made by both Plaintiffs and new GM that the equitable mootness threshold is not ripe for adjudication. We understand --

THE COURT: Oh, I'm still thinking the JP Morgan Chase.

MS. NEWMAN: Sure.

THE COURT: Go ahead.

MS. NEWMAN: Okay, so we --

THE COURT: Yeah, we better address it.

MS. NEWMAN: Okay, so we understood Your Honor to say when we were here in August, well, my partner Mr. Golden was here in August, that as a matter of fundamental fairness, Your Honor wanted to consider all potential avenues of recovery for Plaintiffs at the same time.

As a matter of fundamental fairness both to the Court and to all the parties, and we agree that that is the best approach and the only approach that is fair, but as a matter of law, the equitable mootness threshold issue clearly presents a real and substantial controversy of sufficient immediacy to warrant adjudication by this Court.

Now, new GM has stated repeatedly that Plaintiffs do not need to, and should not be permitted to, pursue claims against new GM because they may instead pursue claims against the GUC Trust. And the Plaintiffs have demanded that the GUC Trust withhold future distributions in reserve for their claims notwithstanding that they've taken no actions to actually assert claims against the GUC Trust, or to stay distributions, or to obtain an order from Your Honor staying distributions.

I think it's plain that a ruling from the Court clarifying that the Plaintiffs cannot, at this late date, pursue assets that rightfully belong to GUC Trust beneficiaries, will solidify and clarify the parties' rights

and be to the benefit of everyone in this room.

Your Honor, I think that -- unless Your Honor has additional questions, I think we'll rest and reserve some time for rebuttal.

THE COURT: Fair enough. Who's next? Mr. Weisfelner?

MR. WEISFELNER: Your Honor, I don't have a lot to say. I think we will rest on our papers. I just want to make one point. As to the argument Ms. Newman made about prejudice and failure to pursue remedies, I just want to stress the fact that the distribution, to which Plaintiffs took no action, was all of about $240 million dollars, or some two percent of what the initial distribution was. And Your Honor asked the question, I don't think $240 million or 2.6 percent in any way, shape or form, represents the proverbial salami. So, as to the prejudice argument, I think I'd underscore that.

The other point is, GUC unit holders. Now, we don't have a record beyond what's in the stipulations, but I'm going to bet, because I know a little bit about Trusts that were created from a plan of reorganization, and how they tend to operate, but I'm going to bet that the value of those units went down dramatically after the recalls took place, and certainly after the statements by new GM that they thought the right remedy was for the Plaintiffs to go

attack the GUC Trust.

I don't know what Debtor notice could be given to the GUC unit holders, other than through their counsel, other than through the public statements made by both GM and, for that matter, the GUC Trust administrator with regard to the possible implications for the market value of their units. And other than that Your Honor, unless you have any questions, we'll just -- we'll rest on our papers.

THE COURT: Fair enough, thank you. Mr. Steinberg?

MR. STEINBERG: Your Honor, the issue of equitable mootness assumes that the Plaintiffs claims are retained liabilities and that they're assertable against the old GM Estate, but for equitable mootness principles. Its premise on the Creditors' expectations from the confirmation order in the plan, and in a somewhat circular argument, the GUC Trust argues equitable mootness based on their own quarterly reports.

Importantly, the mootness doctrines predicated on point of seeking to upset the confirmation order, and that's why they went through the Chateaugay factors, but no one has tried to do that. The time to appeal has expired already, and the underlying premise of the equitable mootness issue is that claims will be filed against the GUC Trust by the Plaintiffs, but that never occurred.

In October, when the Plaintiffs were given a chance to re-plead their consolidated complaints in the MDL, they did not assert a claim against the GUC Trust or the old GM Estate. And then, as people talked about today, the Plaintiff took no action to stop the GUC Trust from distributing over $200 million dollars in a distribution in November of 2014.

So the question that we raise in our papers is, why is this issue ripe for anything at this point in time? We don't know what is going to be asserted, and we don't know what the defense is. We're actually trying to deal with the tail instead of the actual issue at all.

I share with Mr. Weisfelner's concerns as to whether the GUC Trust is as broke as they say, and certainly the impact of the JP Morgan litigation, and other than that, I'll rest on my papers, because I do think in our papers, we cited to some actual statements which we didn't think was true, and we wanted the record to be clarified. Thank you.

THE COURT: Okay. Thanks. Ms. Newman, reply?

MS. NEWMAN: I'll be brief, Your Honor. I just -- to respond to Mr. Weisfelner's argument that the can't think of any better notice than the GUC Trust disclosures, it is clear, based on the existing case law, and in particular, the Calpine case --

THE COURT: Hold the mic closer to you, please?

MS. NEWMAN: Sure. I can lean a little forward, too -- and also in the Calpine case, there were similar arguments made that it's incumbent upon the Creditors Committee, the Debtors, to provide notice, and that people, in fact, did have actual notice of what was being sought in the Calpine case, and that argument was rejected, and the Court very clearly held that it is -- the party seeking the modification must show that it provided actual notice to parties who could be adversely affected by the relief it was seeking.

With respect --

THE COURT: Well, forgive me, Ms. Newman.

MS. NEWMAN: Sure.

THE COURT: How did you, or Mr. Golden, show up if it weren't for the fact that somehow you knew that there was a threat to your constituency's interest?

MS. NEWMAN: Well, it's quite clear, Your Honor, that certain unit holders did know, but we don't represent the entire universe of unit holders, nor do we represent all GUC Trust beneficiaries. So the fact that some people may know, some beneficiaries, some unit holders may be aware, does not satisfy the necessary showing that all unit holders, all beneficiaries be provided with notice that their recoveries may be significantly impaired and potentially completely eviscerated.

With respect to Mr. Steinberg's argument that this is not the time to address this, I'll just note, Your Honor, I think it's highly ironic that new GM is taking the position that the Court should refrain from ruling on this issue while saying at the same time, that Plaintiffs can and should be pursuing the GUC Trust. Under the requirements under applicable law about the kind of dispute that is necessary in order to render a dispute right and ready for adjudication, I think we clearly satisfy that standard.

THE COURT: All right, thank you.

MS. NEWMAN: Thank you, Your Honor.

THE COURT: All right, folks, it's been a long day and a half. I'm going to take all of the matters under submission. Has a transcript already been ordered by any of the people who have argued?

MR. STEINBERG: Your Honor, we tried to order the transcript yesterday so I could prepare for today, but it hasn't arrived today. I assume it'll come --

MAN: You should get yesterday's today.

MR. STEINBERG: I assume we'll get yesterday's today, and we'll order today's transcript as well, and as a courtesy, I guess, to Your Honor and to the other parties, anybody wants a transcript, we'll provide it.

THE COURT: Well, somehow, I suspect that there's going to be a pile of appeals. You're going to need a

transcript for the record on appeal. Get it to my Chambers as quickly as you can. United States Congress being what it is, I don't know if we have the funding to order them on our own. Would you provide them, please?

MR. STEINBERG: Absolutely.

THE COURT: Thanks very much. Very helpful arguments all around. We're adjourned.

MR. STEINBERG: Thank you, Judge.

(Whereupon these proceedings were concluded at 1:14 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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